# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913

No. [redacted] 178

G. & C. MERRIAM COMPANY, APPELLANT,

*vs.*

ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY, AND GEORGE W. OGILVIE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JUNE 15, 1914.

(24,271)

# (24,271)

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## OCTOBER TERM, 1914.

# No. 527.

G. & C. MERRIAM COMPANY, APPELLANT,

*vs.*

ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY, AND GEORGE W. OGILVIE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division, ss:*

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Cleveland, in said District, on the first Tuesday in October, being the 7th day of said month, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-eighth, to-wit: on Thursday, the 16th day of October, A. D. 1913.

Present: The Honorable William L. Day, United States District Judge.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Said action was commenced on the 26th day of December, A. D. 1908, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

2 (*Supplemental Bill. Filed Dec.* 16, 1912.)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Supplemental Bill.

To the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Your orator, the G. & C. Merriam Company, a corporation, the complainant above named, by leave of Court first duly had and ob-

tained, brings this its Supplemental Bill of Complaint against Arthur J. Saalfield, The Saalfield Publishing Company, a corporation, and George W. Ogilvie, the defendants above named, and thereupon your orator shows to the Court:

First.

1. That on or about the 26th day of December, 1908, your orator filed its bill of complaint in this honorable court against Arthur J. Saalfield, one of the defendants above named, for the purpose of obtaining relief against the unfair competition of said defendant in the business of publishing and selling dictionaries, said unlawful competition being alleged to consist in the unlawful, false and deceptive use of the name "Webster's" in connection with defendant's said dictionaries, and the publication by defendant of fraudulent and misleading advertisements and notices of his said dictionaries, all of which tended to deceive the public and to pass off defendant's
3 said dictionaries as and for the dictionaries of complainant; that said bill prayed for an injunction and an accounting of profits and damages against said defendant, all of which will more fully and at large appear from said bill now upon file in this court, to which reference is made for greater certainty.

2. That said defendant, Arthur J. Saalfield, was duly served with process of subpœna, and thereafter appeared in answer to said bill, and thereafter such proceedings were had in said suit that an interlocutory decree was duly made and entered herein by this court on or about the 11th day of September, 1912, whereby complainant was granted an injunction and an accounting of damages and profits, and certain matters were referred to a Special Master, appointed by this court, to hear and take proofs, and report with his opinion to this court, all of which will more fully and at large appear from said decree now on file in this court to which reference is made for greater certainty, and a copy of which is annexed hereto, marked "Exhibit A," and made a part hereof.

3. That this cause is now pending in this court awaiting the report of the Special Master herein upon the matters referrd to him by said interlocutory decree.

4. That said interlocutory decree herein, as shown by the opinion and proceedings heretofore had in this cause and upon which said decree was entered, proceeds upon the ground that defendant-' said dictionaries involved in this suit and entitled respectively, "Webster's Universal Dictionary," (sometimes called "Webster's Imperial Dictionary") "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary," and "Webster's Sterling Dictionary" are revisions and abridgements of, or based upon, the genuine Webster's
4 Dictionary of the edition of 1847, upon which edition the copy-right has expired, it being held herein, that such expiration of copy-right authorized the defendant, Arthur J. Saalfield, and his predecessor in title, the defendant, George W. Ogilvie, under whom the defendant Saalfield claims, to publish such expired edition or revisions of it, and to entitle such revisions Webster's Dictionary, provided an adequate explanation is used as indicated by

the said decree to distinguish such dictionaries of defendant from those of the complainant.

Second.

1. Your orator further shows by way of supplement that your orator has lately, and since the entry of said interlocutory decree herein, discovered and learned for the first time, and now charges the fact to be, that the said three small dictionaries of defendant involved in this suit to wit, the dictionaries entitled respectively, "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary" and "Webster's Sterling Dictionary," are neither of them either based upon, revisions of, or abridged from any genuine Webster Distionary of the edition of 1847, or of any other edition, nor are they abridged from defendants' said "Webster's Universal Dictionary," (sometimes called "Webster's Imperial Dictionary"), as they falsely purport to be, and upon which assumption it was held in this suit that they were entitled to bear the name "Webster's," provided that name was accompanied by an explanatory notice as required by the decree; that on the contrary, defendants' said "Webster's Inter-Collegiate Dictionary" was based upon and copied from, and is a substantial and almost verbatim copy of a certain well known British dictionary entitled "Chambers' Twentieth Century Dictionary," as will conclusively appear from a comparison of said dictionaries here in court to be produced; that said "Webster's Adequate Dictionary" is merely a slightly condensed edition of defendants' said "Webster's Inter-Collegiate Dictionary," and is made by merely omitting a small amount of the matter contained in said last named dictionary, and said "Webster's Adequate Dictionary" is equally based upon and copied from said British dictionary entitled, "Chamber's Twentieth Century Dictionary;" that defendants' said "Webster's Sterling Dictionary" is identical in all respects with defendants' said "Adequate Dictionary" last above named, being the same identical book under a different name, but printed in smaller type, the pages being reduced in size by some photographic process, as your petitioner is informed and verily believes and charges the fact to be; that none of said three small dictionaries of defendants herein named have any connection or relation of any kind, either direct or indirect, with any edition of Webster's Dictionary, and not even any connection with defendants' large dictionary involved in this suit and entitled sometimes "Webster's Universal Dictionary" and sometimes "Webster's Imperial Dictionary;" that the use of the name "Webster's" in the titles of and in connection with said three small dictionaries of defendants is unnecessary, inappropriate, false and misleading, and constitutes a false and fraudulent misrepresentation as to the identity and source of said dictionaries, and is calculated and intended to deceive the public and to pass off said dictionaries of defendants as and for the established and well known "Webster" dictionaries of your orator; that the facts as to the true nature and origin of defendants' said dictionaries hereinabove alleged were not offered in evidence or in any way brought to the attention of the

court because the complainant was at all times, and until
6 after the entry of the decree herein, in ignorance thereof; that said facts are competent, material and important evidence on behalf of your orator in support of the case made by the original bill herein, and if known to the court at the time of the decision herein, would have led to an injunction against the use of the name "Webster's" in the title or as descriptive of said small dictionaries of defendants, because it destroys the entire basis of fact upon which said decision and decree was rendered; that it is unlawful and fraudulent on the part of defendants to take a British dictionary and to change its title and sell it as and for a Webster's Dictionary in competition with your orator's well known and established Webster's dictionaries.

2. That said three small dictionaries of defendants to wit, "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary" and "Webster's Sterling Dictionary" were first published by defendant, George W. Ogilvie, in or about the year 1907, and long after the filing of the bill and cross-bill in the suit in the First Circuit between your orator and said George W. Ogilvie, which suit is referred to in the pleadings and proceedings herein, and the decree in which has been held to be res judicata as to the defendant Saalfield in this case; that the publication of said dictionaries was also after the taking of evidence and proofs upon said bill and cross-bill in said suit in the First Circuit had been closed, said proofs having been closed early in the year 1906; that said small dictionaries were not in any way brought to the attention of the court in the First Circuit, and were not in any way dealt with by said court, and no inquiry as to the nature, origin or identity of said dictionaries was, or could
7 have been, made in said suit, for the reasons aforesaid.

3. That your orator had no means of knowing the above stated facts as to the nature and origin of defendants' said dictionaries, because all knowledge thereof was exclusively within the possession of defendants and their employees or agents; that your orator discovered said facts quite by accident and in the course of an examination and comparison of numerous dictionaries in connection with a different suit against other parties and involving a wholly different dictionary; that an earlier discovery of the above facts was prevented by the misrepresentation and concealment of defendants who printed upon the title page of each of said dictionaries the statement: "Based on Webster's Imperial and Universal Dictionaries," which said statement is wholly and demonstrably false and which misled your orator who believed and relied thereon in the absence of any information to the contrary.

## Third.

1. Your orator further shows by way of further supplemental matter, that pending the prosecution of this suit, defendant, Arthur J. Saalfield, has transferred and assigned to the Saalfield Publishing Company, a corporation, his business of publishing and selling the dictionaries involved in this suit, the precise terms and conditions of

which transfer or assignment are unknown to your orator, and your orator prays a discovery thereof; that said Saalfield Publishing Company, a corporation, is the successor of and claims through and under said defendant, Arthur J. Saalfield, and is bound by all the proceedings had and taken herein; that said Saalfield Publishing Company from and after the time of said assignment and transfer, the precise date of which is unknown to your orator, who prays
8 a discovery thereof, continued and carried on said business of publishing and selling said dictionaries under said various names and titles, and now is continuing to so carry on said business, and is now publishing and selling said dictionaries under said titles; that it is convenient and proper to require said defendant, the Saalfield Publishing Company, to account to the complainant in the present accounting proceedings now pending before the Master herein.

## Fourth.

1. Your orator further shows by way of further supplemental matter, that since the entry of said interlocutory decree herein, it has discovered and learned for the first time, and the fact is, as your orator is informed and verily believes and charges the fact to be, that said defendant, George W. Ogilvie, has from the beginning of this suit actively conducted, controlled and directed the defense thereof; that said defendant Ogilvie selected and retained the solicitors and counsel who appeared and represented the defendant Saalfield herein; that he so selected and retained as such solicitors and counsel, Mr. George F. Bean, of Boston, Massachusetts, who had previously acted as solicitor and counsel for said defendant Ogilvie, in said prior litigation in the First Circuit between said Ogilvie and your orator, which is referred to in the pleadings and proceedings herein; that he also selected and retained as solicitors for defendant Saalfield herein, the firm of Weed, Miller and Nason of Cleveland, Ohio, in this district, who in pursuance of said retainer appeared on behalf of said defendant herein; that the fees and disbursements of said solicitors and counsel in and about the defense of this suit in this court, and upon the appeal herein, have been paid or assumed by said defendant Ogilvie, as your orator is informed and
9 verily believes and charges the fact to be; that in all their proceedings prior to the entry of the decree herein, said solicitors and counsel acted for and under the directions and instructions of said defendant Ogilvie, who in fact and in law was their client; that said defense of this suit was conducted for and in the interest of said Ogilvie, although it was conducted in the name of the defendant Saalfield; that said defendant Saalfield paid substantially no attention to this suit, but left its defense wholly in the hands of said defendant Ogilvie, until about the time when it was decided herein that defendant Saalfield must account for damages and profits by reason of the unlawful acts complained of in the original bill herein; that the fact of said Ogilvie's connection with, and active participation in the defense of this suit was unknown to complainant and not disclosed to complainant until after the entry

of the interlocutory decree herein at which time your orator learned of it for the first time through a statement to it by defendant Saalfield in a conference in regard to the accounting herein, at which time said Saalfield stated to complainant the facts above alleged in explanation and justification of his position; that a large part of the unlawful profits upon defendants' said dictionaries, for which an accounting has been ordered, have been paid by defendant Saalfield to said Ogilvie in the form of royalties upon the books sold by said defendant Saalfield and his successor in title, the defendant Saalfield Publishing Company, and it is proper and right that said defendant Ogilvie shall account therefor to your orator in the present accounting proceeding now pending before the Master herein; that said defendant Ogilvie has otherwise actively participated in and contributed to the violation of complainant's rights adjudged by
10 the decree herein; that your orator is informed and verily believes and charges the fact to be, that said defendant Ogilvie is now and always has been, the owner and proprietor of said dictionaries involved in this suit, which said dictionaries are published and sold for the benefit and profit of said Ogilvie by said defendant, Saalfield, and said defendant, the Saalfield Publishing Company, under some form of contract, the precise terms and conditions of which are unknown to your orator, which contract provides for a royalty payment *of* said Ogilvie for each copy of said dictionaries sold by said defendants, Saalfield and the Saalfield Publishing Company; that said defendant, Ogilvie, as the owner and proprietor of the books involved herein is interested in the proceedings had, taken or to be taken in this suit; that by reason of the facts aforesaid, said defendant, George W. Ogilvie, has made himself a privy to this suit, and an actual though not a nominal party thereto, and he is bound by the proceedings and decree herein.

2. That said defendant, George W. Ogilvie, is the same person of that name who was the complainant and cross-defendant in a suit in the First Circuit between him and your orator hereinbefore referred to, and he is the person through and under whom the defendant, Arthur J. Saalfield, claims in this suit; that the injunction granted agains- said Ogilvie by the court in the First Circuit, referred to in the prior proceedings herein, is still in force and operation against said Ogilvie; that, as already found and adjudged in this case, the publication and sale, and the advertisements of, the dictionaries involved in this case have been in violation of said injunction, and your orator, is informed and believes that said de-
11 fendant Ogilvie actively participated and assisted in, and profited from, said violation.

## Fifth.

And forasmuch as your orator can have no adequate relief, except in this honorable court, to the end therefore, that said defendants, and each of them, may, if they can, show why your orator should not have the relief hereby prayed, and may according to their best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises, and to all the

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several matters hereinbefore stated and charged, as well — those in regard to which they are herein severally and separately interrogated, as also the matters hereinbefore stated in general, but not under oath, the oath being hereby specifically waived, and more particularly that said defendants may answer the following interrogatories, to wit:

## Interrogatories.

1. Whether or not, and if so, when the defendant, the Saalfield Publishing Company, a corporation, succeeded to the business of publishing and selling the dictionaries involved in this suit theretofore carried on by said defendant, Arthur J. Saalfield, and if so, the terms and conditions of said assignment or transfer of said business, setting out a copy thereof, if the same is in writing.

2. Whether or not it is true that said defendant, George W. Ogilvie, conducted or participated in any manner in the defense of this suit in this court, and if so, what he did in that connection, including whether or not he selected and retained or employed the solicitors and counsel, or either of them who appeared and defended said suit, and whether or not he paid, or agreed to pay, the whole or any part of the fees or disbursements of said solicitors and counsel for the defendant herein, or either of them, and whether or not he paid any part of the expenses of defending this suit prior to this time.

3. Whether or not said defendant Ogilvie is the owner or proprietor of the copyrights upon all or any of the defendants' said dictionaries involved in this suit, or has been so at any time, and if so, when he acquired said copyrights, or any of them; and if he has parted with or disposed of said copyrights, or any of them, the date when he did so.

4. Whether or not said defendant Ogilvie has received royalty payments, or other payments from defendant Saalfield, on account of the sale by said Saalfield of the dictionaries involved in this suit, and if so, the rate and total amount of said payments so received by him on account of each dictionary involved in this suit.

5. Whether or not said defendant Ogilvie had anything to do with the preparation or publication of all or any of the advertisements, notices and announcements of defendants' said dictionaries which have been issued since said Saalfield began the publication and sale thereof, and if so, state with particularity what was done by said Ogilvie in this regard, and particularly whether or not he approved of said advertisements or notices in advance of their publication. And that said defendants, and each of them, may account for and pay to your orator the profits by them respectively acquired; and the damages suffered by your orator from the aforesaid unlawful acts;

And that said defendants, their agents, servants, attorneys and workmen, and each and every of them, may be restrained and enjoined, provisionally and perpetually, by the order and injunction of this honorable court, from directly and indirectly, using the name

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"Webster" or "Webster's Dictionary," either alone or with
13 other words, or any equivalent thereof, as the name or title of, or as descriptive of, either or all of said three small dictionaries of defendants hereinbefore described, and entitled respectively, "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary," and "Webster's Sterling Dictionary," and from so using said names or titles in any notices, advertisements or announcements of, or referring to, said dictionaries, and especially from using said names or titles nor and heretofore used, to wit, "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary" and "Webster's Sterling Dictionary," or either of them, or any equivalent thereof, in or upon said dictionaries, or either of them, or in connection with or as referring thereto; and that the decree and injunction heretofore entered and issued herein be modified accordingly, and as so modified, be adjudged binding upon all the defendants herein;

And that your orator may have the same relief against each and all of said defendants, Arthur J. Saalfield, the Saalfield Publishing Company, a corporation, and George W. Ogilvie, as it might have had if the facts hereinbefore stated and charged by way of supplement had been stated and charged in your orator's said original bill.

And that your orator may have such further relief, or such other and different relief, as to this honorable court shall seem meet, and as shall be agreeable to equity;

May it please your Honors to grant unto your orator the Writ of Injunction, as well provisional as perpetual, issuing out of and under the seal of this honorable court, commanding enjoining and restraining the said defendants and their servants, agents attorneys and workmen, and each and every of them, as hereinbefore in that behalf prayed;

May it please your Honors to grant to your orator the
14 Writ of Subpœna issuing out of and under the seal of this honorable court, directed to said defendants, Arthur J. Saalfield, the Saalfield Publishing Company, a corporation, and George W. Ogilvie, commanding them by a certain day, and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against them.

And your orator will ever pray, &c.

Dated, December 14, 1912.

G. & C. MERRIAM COMPANY.
By JAMES A. FORD,
F. C. BOSWORTH,
*Complainant's Solicitors.*

WILLIAM B. HALE,
*Counsel for Complainant.*

The defendants are required to answer the interrogatories herein marked 1, 2, 3, 4, and 5.

JAMES A. FORD,
F. C. BOSWORTH,
*Complainant's Solicitors.*

15 UNITED STATES OF AMERICA,
*State of New York, Southern District of*
*New York, City and County of New York, ss:*

On this 14th day of December, 1912, before*m*e me personally appeared William B. Hale, to me known, who, having been by me first duly sworn, deposes and says, I am the counsel for G. & C. Merriam Company, the complainant herein; I have read the foregoing Supplemental Bill of Complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The sources of my information and the grounds of my belief are a personal inspection and examination of all books, papers and documents referred to, and the examination of numerous witnesses under oath in other cases involving some of the same questions. The reason why this verification is not made by the complainant herein is, that said complainant is a corporation, and not capable of making this verification, and is not within the county where affiant resides and has his office.

WILLIAM B. HALE.

Subscribed and sworn to before me this 14th day of December, 1912.

[SEAL.] ROBT. W. J. CORCORAN,
*Notary Public, Kings Co.*

Certificate filed in New York Co.

16 "EXHIBIT A."

April Term, A. D. 1912, To-wit, September 11, 1912.

Present: Honorable William L. Day, U. S. District Judge.

No. 7683. In Equity.

THE G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD, Trading under the Name of SAALFIELD PUBLISHING COMPANY.

This cause having been removed from the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, to the United States Circuit Court of Appeals for the Sixth Circuit, by the appeal of complainant from the decree entered in this cause on the 5th day of July A. D. 1910, and the said Circuit Court of Appeals having ordered and adjudged that the said decree of said Circuit Court of the United States for the Northern District of Ohio, Eastern Division, be reversed with costs, and the said Circuit Court of Appeals having remanded this cause to this Court with directions to enter a decree for the complainant, and for an injunction and an accounting in conformity with the opinion of said Court, as appears



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by a mandate of the Circuit Court of Appeals now here, now, on motion of solicitor for complainant, it is ordered, adjudged and decreed that the said mandate be filed in the office of the Clerk of this Court, and said mandate be, and is hereby made the order, judgment and decree of this Court, and in accordance therewith it is further ordered, adjudged and decreed in accordance with the said mandate and the opinion of the Circuit Court of Appeals for the Sixth Circuit, filed in said Court on August 6th, 1912, that the prior decree of the Circuit Court of the Northern District of Ohio,
17 dismissed herein be, and the same hereby is, reversed.

And it is further ordered, adjudged and decreed that the complainant, G. & C. Merriam Company, do have and recover of and from the said defendant, Arthur J. Saalfield the profits, gains and advantages which said defendant received or made, or which have arisen or accrued to him, and also all the damages which said complainnt, G. & C. Merriam Company, has suffered, by reason of all or any of defendant's aforesaid unlawful acts, committed by him on and after the 21st day of April, 1909.

And it is further ordered, adjudged and decreed that this cause be and the same hereby is referred to Bertrand C. Miller, Esq., who on account of special fitness and experience in matters of accounting is appointed Special Master in this case, to take and hear proofs, and to report the same, together with his findings of fact and conclusions of law, to this Court, with all convenient speed, as to the amount of complainant's said damages, and of defendant's said unlawful profits, gains and advantages; also as to whether or not, and if so, to what extent, defendant's dictionaries, publications, advertisements, notices, announcements, and sales since on and after the 21st day of April, 1909, have been in conformity to the terms of the decree against predecessor George W. Ogilvie, and of this decree; also as to whether or not the exterior of each and all of defendant's said books, in the use of the title, or in other inscription or in decoration, or ornament, was, or is, calculated to deceive purchasers; also as to whether or not the prescribed notice properly printed on the title page of defendant's dictionaries would cure any misleading, otherwise naturally caused, by the exterior of said dic-
18 tionaries, if any would be so caused; also as to whether or not the prescribed notice was, or is, plainly printed by defendant in the instances where it has been used by him; also as to whether or not the title qualification is required in connection with each use of the title and in what juxtaposition also as to whether or not the name "Inter-Collegiate" is of itself a violation of complainant's rights; also as to whether or not the defendant has acted in good or bad faith in what he had done in purported observance of the terms of the decree against his predecessor, George W. Ogilvie, and of this decree, and the effect thereof upon defendant's equitable liability for profits; and that said Master be, and he hereby is authorized to discharge his duties as Master at any convenient place as he may be advised, outside of, as well as within, the Northern District of Ohio; and that on the proceedings before the Master complainant have the right to cause an examination of said defendant, his agents, servants, employees, workmen and other witnesses as may be neces-

sary, and to have produced all books vouchers, letters, orders, documents, or other papers which may be relevant or material to the issues before said Master, with leave to inspect the same; and that defendant, his agents, servants, employees, and workmen attend for such purpose before said Master from time to time as said Master shall direct; and it is further ordered, adjudged and decreed that a perpetual injunction issue in this suit restraining defendant, Arthur J. Saalfield, his agents, attorneys, servants, employees and all persons claiming or holding through or under him, from using as the name or title of his said dictionaries described in the Bill herein, to which this litigation relates, the words, "Webster's Dictionary" or "Webster's Imperial Dictionary," or "Webster's Universal Dictionary," or "Webster's Inter-Collegiate Dictionary," or "Webster's Adequate Dictionary," or "Webster's Sterling Dictionary," or any equivalent thereto, upon the title page or upon the back or cover of said dictionaries, or in any advertisement, circular, notice or announcement referring to said dictionary, unless accompanied by the following statement plainly printed upon the title page and in each said advertisement, circular, notice or announcement, viz: "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors," and especially from publishing or issuing in the form used by George W. Ogilvie with reference to certain of said dictionaries the title page and backs of said dictionaries and the circulars and advertisements adjudged misleading or deceptive by the United States Circuit Court for the District of Massachusetts, in the suit wherein the complainant herein and George W. Ogilvie were parties, or any other form of title page, back, circular, or advertisement that is in any way calculated to deceive purchasers into purchasing defendant's dictionary under the belief that it is a Webster's Dictionary published by the complainant.

And it is further ordered, adjudged and decreed that the Master herein appointed, in taking testimony as to the profits, if any have been made by the defendant, Arthur J. Saalfield, shall be guided by the opinion of the United States Circuit Court of Appeals, for the Sixth Circuit filed herein on the 6th day of August, 1912;

And it is further ordered, adjudged and decreed that complainant, G. & C. Merriam Company, do have and recover of said defendant, Arthur J. Saalfield, all costs to this date, to be taxed by the Clerk.

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20 (*Affidavit of William B. Hale, Filed Dec. 16, 1912.*)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

UNITED STATES OF AMERICA,
*Northern District of Ohio, County of* ——, *ss:*

William B. Hale, being first duly sworn, deposes and says, that he is counsel for complainant in the above entitled suit; that said defendant, George W. Ogilvie, above named is a non-resident of, and cannot be found within the Northern District of Ohio; that he is informed and believes that said defendant, George W. Ogilvie, is a resident of the City of New York in the State of New York but his precise address is unknown to complainant or this affiant; that the sources of his information and the grounds of his belief are sworn statements made by said Ogilvie during the summer of this year, when examined as a witness in another cause, to the effect that he resided in the City of New York, and also statements to the same effect made to affiant by defendant, Arthur J. Saalfield; that as alleged in the supplemental bill of complaint herein, and as affiant is informed and verily believes, the firm of Weed, Miller and Nason of Cleveland, Ohio, and George F. Bean of No. 176 Federal Street, Boston, Massachusetts, who appeared respectively as solicitors and counsel for defendant, Arthur J. Saalfield, and defended this
21 suit, were in fact retained and employed by said defendant, George W. Ogilvie, for that purpose, and were paid by him and acted under his instructions and directions for the protection of the interests of said defendant, Ogilvie, in the subject-matter of this suit, all as more fully alleged in the supplemental bill herein; that it is impossible to make personal service of the subpœna herein upon said defendant, George W. Ogilvie, in this district, because said defendant, George W. Ogilvie, is not a resident of, and is not to be found within this district; that substituted service of the subpœna herein upon said Ogilvie is necessary in order to enable complainant to proceed with this suit as against said Ogilvie, who has thus voluntarily subjected himself to the jurisdiction of this court, and who is a necessary and proper party to the bill herein to the end that there may be a complete determination of the matters in issue.

Wherefore complainant moves for an order authorizing substituted service of the subpœna herein upon the said solicitors and counsel for said George W. Ogilvie, or in such other manner as the

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court may direct, and for such other and further or different relief as may be just.

WILLIAM B. HALE.

Subscribed and sworn to before me this 16th day of December, 1912.

B. C. MILLER,
*Clerk U. S. Dist. Court, No. Dist., Ohio.*

22 (*Order for Substituted Service. Entered December 16, 1912, by Judge Day.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

On reading and filing the annexed affidavit of William B. Hale, verified the 16th day of December, 1912 upon the supplemental bill of complaint herein, and upon all the proceedings had and taken in this cause, and upon motion of William B. Hale, counsel for complainant, it is

Ordered that substituted service of the subpœna herein, directed to defendant, George W. Ogilvie, be, and the same hereby is, authorized to be made by serving said subpœna upon the firm of Weed, Miller and Nason in this district, as solicitors for said George W. Ogilvie, together with a copy of this order; and also by serving a copy of said subpœna, together with a copy of this order; upon George F. Bean, in the district of Massachusetts, as counsel for said George W. Ogilvie. Personal service of a copy of said subpœna upon said defendant, George W. Ogilvie, together with a copy of this order, wherever said defendant may be found, shall likewise be deemed sufficient.

23 (*Subpœna in Equity, Served on Weed, Miller, and Nason, Issued Dec. 16, 1912.*)

UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You Are Hereby Commanded To Summon George W. Ogilvie, Impleaded with others, citizen of and resident in the State of Ohio, if he be found in your District, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on the first Monday in March next, to answer a certain

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Supplemental Bill in Chancery, filed and exhibited in said Court, against him by G. & C. Merriam Company, a corporation, citizen of and resident in the State of Massachusetts.

Hereof you are not to fail under the penalty of the law thence insuing.

And have you then and there this writ.

Witness, the Honorable William L. Day, of the United States, this 14th day of December, A. D. 1912, and in the 137th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk*,
By R. C. DEAN,
*Deputy Clerk.*

*Memorandum.*

The said defendant is required to enter his appearance in this suit in the Clerk's Office of said Court on or before the first Monday of February, 1913, otherwise the said bill may be taken pro confesso.

B. C. MILLER, *Clerk*,
D.

24 (Endorsement when issued:) No. 27. (7683.) U. S. Marshal's No. 3505. United States District Court, Northern District of Ohio. G. & C. Merriam Co., a corp., vs. Arthur J. Saalfield, etc. Subpœna in Chancery. Appearance Day, First Monday, in February 1913. Answer Day, First Monday in March 1913. Deposit by complainant for costs. B. C. Miller, Clerk. D. F. O. Bosworth, J. A. Ford, William B. Hale, Complainant's Attorneys.

(*Endorsement when Returned.*)

THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

U. S. Marshal's Return.

Received this writ at Cleveland, O., Dec. 16, 1912, and on the same day, at the same place, I served it on the within named George W. Ogilvie by delivering to Weed, Miller & Nason (real firm name Weed, Miller & Rothenberg) attorneys, by copy to Charles R. Miller, co-partner of the firm of Weed, Miller & Rothenberg, a true and certified copy hereof, with all endorsements thereon, together with a certified copy of Order for Substitute Service.

HYMAN D. DAVIS,
*U. S. Marshal.*
By F. M. FANNING, *Deputy.*

Marshal's Fees:

| | | |
|---|---|---|
| Service ..... | Spa..... | $2.00 |
| Travel ..... | " ..... | .06 |
| Service ..... | Order..... | 2.00 |
| Travel ..... | " ..... | .06 |
| | | $4.12 |

Returned and filed December 17, 1912. B. C. Miller, Clerk, U. S. District Court, N. D. O.

25 (*Subpœna in Equity, Served on George F. Bean, Issued December* 16, 1912.)

UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

You Are Hereby Commanded to Summon George W. Ogilvie, Impleaded with others, citizen of and resident in the State of Ohio, if he be found in your District, to be and appear in the District Court of the United States for the Northern District of Ohio, aforesaid, at Cleveland, on the first Monday in March, next, to answer a certain Supplemental Bill in Chancery, filed and exhibited in said Court, against him by G. & C. Merriam Company, a Corporation citizen of and resident in the State of Massachusetts.

Hereof you are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness, the Honorable William L. Day, of the United States, this 16th day of December, A. D. 1912, and in the 137th year of the Independence of the United States of America.

[SEAL.] B. C. MILLER, *Clerk*,
By R. C. DEAN,
*Deputy Clerk.*

*Memorandum.*

The said defendant is required to enter his appearance in this suit in the Clerk's Office of said Court on or before the first Monday of February, 1913, otherwise the said bill may be taken pro confesso.

[SEAL.] B. C. MILLER, *Clerk.*

26 (Endorsement when issued:) No. 27. (7683). United States District Court, Northern District of Ohio. U. S. Marshal's No. 9360. G. & C. Merriam Co., a corporation, vs. Arthur J. Saalfield, etc. Subpœna in Chancery. Appearance Day, First Monday in February, 1913. Answer Day, First Monday in March 1913. Deposit. F. O. Bosworth, J. A. Ford, William B. Hale, Complainant's Attorneys.

UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

I, B. C. Miller, Clerk of the United States District Court within and for said district, do hereby certify that the foregoing is a full, true and complete copy of a Subpœna in Chancery issued out of this Court, on the day therein stated.

[SEAL.]

B. C. MILLER, *Clerk.*
By R. C. DEAN,
*Deputy Clerk.*

(Endorsement when returned.)

UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

BOSTON, December 19th, 1912.

I hereby certify that I have this day made service of the within subpœna on George F. Bean, Attorney at Law at 176 Federal Street, Boston, by giving to him in hand a certified copy of this subpœna.

GUY MURCHIE,
*U. S. Marshal,*
By JAMES C. RUHL, *Deputy.*

Fees:

| | |
|---|---|
| Service..... | $2.00 |
| Travel..... | .00 |
| | $2.00 |

Personally appeared before me James C. Ruhl, Deputy United States Marshal for the District of Massachusetts, and made oath that the above return by him subscribed was true.

[SEAL.]

GEORGE A. CROCKWELL,
*Notary Public.*

Boston, Dec. 20, 1912.

(Returned and filed December 26th, 1912, B. C. Miller, Clerk, U. S. District Court, N. D. C.)

27 (*Interlocutory Decree Pro Confesso Against George W. Ogilvie. Entered June 19, 1913, by Judge Day.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE.

The supplemental bill of complaint having been duly filed herein on the sixteenth day of December, 1912, pursuant to leave of court

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first duly had and obtained, and it appearing that a subpœna ad respondendum was duly served upon defendant, George W. Ogilvie, in accordance with an order for substituted service duly made and entered herein on the 16th day of December, 1912, and it further appearing from an affidavit made by said defendant, George W. Ogilvie and filed in this cause on to wit, the 22nd day of February, 1913, that said defendant, George W. Ogilvie, has had actual notice of said supplemental bill, and no appearance, plea, answer, demurrer or motion having been made or filed herein on behalf of said defendant, George W. Ogilvie, and the time for filing the same not having been enlarged, and an order having been duly entered herein in the order book taking said bill pro confesso as against said defendant, George W. Ogilvie, and more than thirty days having elapsed since the entry of said order taking said bill pro confesso, Now on motion of complainant's solicitors, it is Ordered, Adjudged and Decreed:

First. That said defendant, George W. Ogilvie, participated in, and contributed to the violation of complainant's rights as charged in the original and supplemental bills herein, and as adjudged in the interlocutory decree entered herein on the 11th day of
28 September, 1912; that said defendant, George W. Ogilvie, conducted, controlled and directed the defense to the original bill herein, through solicitors and counsel selected, retained and employed by him, and acting in his interest, and paid or assumed the costs and expenses in and about said defense, and made himself a privy to this suit, and became, and is, bound by the decree and all the proceedings heretofore had and taken herein.

Second. That the complainant, G. & C. Merriam Company, do have and recover of and from the said defendant George W. Ogilvie, the profits, gains and advantages which said defendant has received or made, or which have arisen or accrued to him, and also all damages which said complainant, G. & C. Merriam Company, has suffered by reason of all or any of defendant's aforesaid unlawful acts committed on and after the 21st day of April, 1909.

Third. That it be referred to Bertrand C. Miller, Esq., who on account of especial fitness and experience in matters of accounting, and also because other matters arising in this cause have already been referred to him by said interlocutory decree of September 11th, 1912, is appointed Special Master in this cause, to take and hear proofs and report the same, together with his findings of fact and conclusions of law, to this Court with all convenient speed, as to the amount of complainant's said damages and of defendant's said unlawful profits, gains and advantages, and that upon the coming in and confirmation of said report, that complainant have judgment against said defendant, George W. Ogilvie, for the amount of damages and profits so found; and that said Special Master be, and he hereby is, authorized to discharge his duties as Master at any convenient place as he may be advised, outside of, as well as
29 within the Northern District of Ohio; and that on the proceedings before the Master, complainant have the right to cause an examination of said defendant, George W. Ogilvie, his



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agents, servants, employees, workmen, and other witnesses as may be necessary, and to have produced all books, vouchers, letters, orders, documents or other papers which may be relevant or material to the issues before said Master, with leave to inspect the same; and that defendant, George W. Ogilvie, his agents, servants, employees and workmen, attend for such purpose before said Master from time to time as said Master shall direct.

Fourth. That a Writ of Injunction issue herein under the seal of this Court, perpetually restraining said defendant, George W. Ogilvie, his agents, servants, attorneys, employees, and all persons claiming or holding through or under him, from either directly or indirectly, using as the name or title of the so-called "Webster's Imperial Dictionary" or "Webster's Universal Dictionary" filed herein as exhibits, or any editions or revisions thereof, the words, "Webster's Dictionary", or "Webster's Imperial Dictionary", or "Webster's Universal Dictionary", or any equivalent thereof, either with or without other words, upon the title page or upon the back or cover of said dictionaries, or in any circular, notice, advertisement or announcement referring to said dictionaries, unless accompanied by the following statement, viz:

"This Dictionary is not published by the original publishers of Webster's Dictionary, or by their successors",

which said statement shall be plainly printed and prominently displayed upon the title page, and upon the back or cover of said dictionaries, and in each said advertisement, circular, notice or announcement, in a separate line or paragraph by itself, and in immediate juxtaposition to each use of said titles, and from either directly or indirectly using as the whole or as a part of the names or title of, or as descriptive of, either or all of the said small dictionaries of defendants described in the original and supplemental bills herein, and entitled respectively, "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary", and "Webster's Sterling Dictionary", or of any editions or revisions thereof, either in or upon said dictionaries, or in any circulars, notices, advertisements or announcements referring to said dictionaries, or either of them, the words or names "Webster" or "Webster's Dictionary" or "Inter-Collegiate" or "Webster's Inter-Collegiate Dictionary", or "Webster's Adequate Dictionary" or "Webster's Sterling Dictionary", or either of them, or any equivalent thereof, either alone or with other words, and especially from publishing or issuing in the form used by George W. Ogilvie with reference to certain of said Dictionaries the title pages and backs of said dictionaries, and the circulars and advertisements adjudged misleading or deceptive by the United States Circuit Court for the District of Massachusetts in the suit wherein the complainant herein and said George W. Ogilvie were parties, or any other form of title page back, circular, or advertisement that is in any way calculated to deceive purchasers into purchasing a dictionary of the defendant under the belief that it is a Webster's Dictionary published by complainant, G. & C. Merriam Company.

Fifth. That the Master herein appointed in taking testimony as

to the profits, if any have been made, of said defendant, George W. Ogilvie, shall be guided by the opinion of the United States
31 Circuit Court of Appeals for the Sixth Circuit, filed herein on the 6th day of August, 1912.

Sixth. That the complainant, G. & C. Merriam Company, do have and recover of said defendant, George W. Ogilvie, all costs to this date to be taxed by the Clerk.

32 (*Final Decree. Entered October* 16, 1913, *by Judge Day.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE.

This cause coming on to be heard upon the interlocutory decree made and entered herein on to wit, June 19th, 1913, and upon the report of Bertrand C. Miller, Special Master, dated and filed herein on September 25th, 1913, and it appearing that said defendant, George W. Ogilvie, has received unlawful gains and profits from the sale of the dictionaries mentioned in said interlocutory decree in the amount of Sixty-nine thousand four hundred and forty-six dollars and thirty-one cents, ($69,446.31), and that complainant is entitled to recover said amount, together with interest thereon, as specified in said Master's report, and the Clerk having calculated said interest, and the same having been found to amount to the sum of Eleven Thousand eight hundred and fifty-two dollars and forty-seven cents, ($11,852.47), now, on motion of the solicitors for G. & C. Merriam Company, the complainant herein, it is

Ordered, adjudged and decreed that the said report of the Special Master herein be, and the same hereby is in all things confirmed; that said interlocutory decree be, and the same hereby is, made the final order and decree of this Court against the said defendant, George W. Ogilvie; and that complainant recover of said defendant, George W. Ogilvie, the sum of Eighty-one thousand three hundred and twelve dollars and seventy-eight cents, ($81,312.78), profits and interest thereon found as aforesaid, together with the sum of
33 Seventy and 98/100 dollars ($70.98) costs, as taxed by the Clerk, aggregating in all the sum of Eighty one thousand three hundred and eighty three and 76/100 dollars, ($81,383.76), and that execution issue therefor.

34 (*Petition for Enforcement of Decree and to Reach Assets. Filed January 22nd, 1914.*)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

## Petition.

To the District Court of the United States for the Northern District of Ohio, Eastern Division:

Your petitioner, G. & C. Merriam Company, the complainant above named, respectfully shows to the Court:

First. That by a final decree in equity made and rendered by this court in this cause on to wit the 16th day of October, 1913, petitioner was awarded a money judgment against the defendant, George W. Ogilvie in the sum of Eighty-one thousand three hundred eighty-three and 76/100 dollars, ($81,383.76), and no part of the said judgment has been paid.

Second. That on to wit the 20th day of October, 1913, a writ of fieri facias was duly issued in this cause and placed in the hands of the Marshal of this Court and the same was on to wit the 22nd day of October, 1913, returned by said Marshal indorsed as follows: "Returned without service. No goods or chattels found in my district."

Third. That, upon information and belief, said judgment debtor George W. Ogilvie has within this District and subject to the jurisdiction and process of this Court the following property and effects, to wit: Debts, demands and choses in action due from The
35 Saalfield Publishing Company, defendant herein, to said judgment debtor, George W. Ogilvie, upon a certain contract between said Ogilvie and said The Saalfield Publishing Company, dated June 24th, 1910, a copy of which is hereto annexed, marked Exhibit A, and made a part hereto; that said The Saalfield Publishing Company is a corporation organized and existing under the laws of the State of Ohio and having its principal place of business in the City of Akron in the Northern District of Ohio, Eastern Division; that the right, title and interest of said Ogilvie in said contract and the benefits which have accrued, and will accrue, to said Ogilvie thereunder are of very great value, said Ogilvie having already received payments thereunder and in accordance with its terms of upwards of Ninety thousand dollars ($90,000) since the commencement of this suit; that the right, title and interest of said Ogilvie in

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said contract constitutes a valuable property interest and is an asset which petitioner is entitled to subject to the payment of its said judgment, but that the same cannot be reached and applied to the payment of said judgment by the ordinary process of execution, but only by means of an order and decree of a Court of Equity; upon information and belief, said Ogilvie is also the owner and proprietor of several copyrights duly entered in the office of the Library of Congress at Washington, District of Columbia, covering and protecting the literary property embraced in said dictionaries known as "Webster's Universal" or "Webster's Imperial Dictionary," "Webster's Inter-Collegiate Dictionary," "Webster's Adequate Dictionary" and "Webster's Sterling Dictionary," which said copyrights were entered at various times beginning in the year 1904 and down to the year 1913, a more particular description of which petitioner asks leave to insert hereafter by amendment when obtained from the Register of Copyrights; that the exclusive license granted to said The
36 Saalfield Publishing Company by said contract of June 24th, 1910, is a license under these copyrights; that, upon information and belief, said Ogilvie is also the owner and proprietor of certain plates, shells or matrices from which said dictionaries hereinbefore mentioned have been, or may be, printed, and that the same are leased to and are in the possession of said The Saalfield Publishing Company pursuant to the provisions of said contract of June 24th, 1910.

Fourth. That pursuant to the terms of said contract, Exhibit A, quarterly settlements of the royalty due thereunder are made between said The Saalfield Publishing Company and said Ogilvie on the first days of February, May, August and November of each year; that upon said dates the amounts found due to said Ogilvie from said The Saalfield Publishing Company upon said settlements are liquidated between them by the giving of certain notes as provided in said contract, which said notes in accordance with the terms of said contract mature and become payable on the first days of February, March, April, June, August, October, November and December of each year; that unless said payments under said contract accrued, and to accrue, and the notes to be given under said contract to said Ogilvie by said The Saalfield Publishing Company are seized and impounded by this Court and applied to the payment of petitioner's said judgment against said Ogilvie, the same will be lost to petitioner and the collection and payment of its said judgment thereby defeated; that the cash payments due upon notes already given to said Ogilvie will be paid to him and removed from the jurisdiction of this Court; that said notes will be likewise sent to said Ogilvie and removed from the jurisdiction of this Court and there is danger that said notes will be negotiated and come
37 into the hands of innocent purchasers for value, and petitioner thereby deprived of the right to apply the proceeds thereof to the payment of its said judgment; that as appears from the dates when said settlements are to be had under said contracts and said notes in liquidation thereof are to be given, and the dates when said notes so given respectively mature, a settlement is to be

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had and notes to be given upon February first next, which is before a hearing and determination of this petition can be had: certain notes previously given will also mature and become payable on February first, and additional notes will mature and become payable upon the first of March and the first of April next proximate: that for the protection of petitioner's aforesaid rights, and pending the hearing and determination upon this petition, it is necessary that a temporary and permanent receiver be appointed, to receive, take and hold, subject to the order of this Court said right, title and interest of said Ogilvie, and of all persons claiming through or under him since the commencement of this suit, in said contract and in said payments and notes to be given thereunder in accordance with the terms thereof, and that a provisional injunction be granted restraining and enjoining said Arthur J. Saalfield and said The Saalfield Publishing Company from delivering said notes or making said or any payments under said contract to said Ogilvie, or to any person claiming through or under him since the commencement of this suit.

Fifth. That said copyrights upon said dictionaries are of great value, but the precise amount of which is unknown to petitioner; that said copyrights cannot be reached by the ordinary process of execution, but are applicable to the payment of petitioner's said judgment and may be seized and impounded and sold and
38 the proceeds of said sale applied to the payment of said judgment only by the order and decree of a Court of Equity; that there is danger that said Ogilvie will, assign, transfer, or otherwise convey or encumber said copyrights, or some of them, before a hearing and determination may be had under this petition, and that, therefore, it is necessary that a temporary and permanent receiver be appointed to hold and sell said copyrights and to apply the proceeds thereof to the payment of petitioner's said judgment, and that in the meantime and until the further order of this Court said Ogilvie be enjoined from in any manner transferring, selling, conveying, assigning or encumbering said copyrights.

Sixth. That there is likewise danger that said Ogilvie may convey, assign, sell, transfer or encumber said plates, shells or matrices from which said dictionaries are printed or from which plates for the printing of said dictionaries may be made, and it is therefore necessary that an injunction be granted against said Ogilvie enjoining and restraining any such action, and also against said Arthur J. Saalfield and said The Saalfield Publishing Company who are in possession of said plates, shells and matrices from parting with the possession thereof until the further order of this Court.

Seventh. That in further support of this petition, petitioner refers to all the proceedings had and taken in this case.

Wherefore petitioner prays relief as follows:

1. That a temporary receiver be appointed herein of all said Ogilvie's right, title and interest in and to said contract between him and said The Saalfield Publishing Company, Exhibit A, and of all notes, payments, debts, demands, claims, chose in action
39 of every kind and nature which may exist in favor of said Ogilvie and against said Arthur J. Saalfield and The Saalfield

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Publishing Company, a corporation, and also of each and all the copyrights upon each and all of said dictionaries, and of the plates, shells and matrices from which said dictionaries have been, or may be, printed, or from which plates for the printing of said dictionaries, may be made; and that upon the hearing and determination of this petition, said receivership may be made permanent and said receiver directed to sell pursuant to the order and direction of this Court all said property and effects of said Ogilvie, and to apply to the payment of petitioner's said judgment the proceeds thereof, and the proceeds of all said notes or payments coming into his hands under said contract as aforesaid.

2. That said George W. Ogilvie, his agents, attorneys, and all persons claiming through or under him be enjoined and restrained, provisionally and perpetually, from selling, assigning, transferring, encumbering, removing or in any manner disposing of any right, title or interest in or to all or any of the copyrights taken out upon all or any of said dictionaries referred to in the pleadings herein, or in or to the plates, shells or matrices from which said dictionaries are, or may be, printed or plates may be made, which may be used for the printing of said dictionaries, or any of them, or in or to the contract or contracts between said Ogilvie and said Saalfield or between said Ogilvie and said The Saalfield Publishing Company, a corporation, under which said dictionaries have been or are being published or sold by said Saalfield or by said The Saalfield Publishing Company, a corporation, or in or to any trademarks, tradenames or titles which have been or are being used in connection with the publication and sale of said dictionaries, or in or to any other of the assets, property and effects of said George W. Ogilvie.

3. That said Arthur J. Saalfield and said The Saalfield Publishing Company, a corporation, and the agents, attorneys, servants, workmen and all persons claiming through or under them, or either of them, be enjoined and restrained, provisionally and perpetually, from making all or any payments to said George W. Ogilvie, or to any person claiming through or under him, or upon his order or for his account, upon any debts or demands which may exist in favor of said George W. Ogilvie and against said Saalfield or said The Saalfield Publishing Company, or both or either of them, and particularly any payments under said contracts, or either of them, between said Ogilvie and said Saalfield or said The Saalfield Publishing Company, and from making or delivering to said Ogilvie, or to any person claiming through or under him, or upon his order or for his account, any note or notes for any amount due or to become due from said Saalfield or said The Saalfield Publishing Company, to said Ogilvie, or to any person claiming through or under said Ogilvie, and from delivering to said Ogilvie, or any person claiming through or under him, or in any manner transferring or removing the plates, sells and matrices used in the printing or publication of said dictionaries hereinbefore mentioned, and from doing any other act or acts which may hinder, delay or obstruct in any manner the subjection of said copyrights, plates, contracts, claims, demands, choses

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in action, or other property or effects of said Ogilvie, to the payment and satisfaction of petitioner's said judgment against said Ogilvie.

41 4. That petitioner have such other, further or different relief as may be just.

G. & C. MERRIAM COMPANY,
*Petitioner,*

By WILLIAM B. HALE,
*Its Solicitor and Counsel.*

Dated January 21st, 1914.

UNITED STATES OF AMERICA,
*State of New York, Southern District of*
*New York, City & County of New York, ss:*

William B. Hale, being duly sworn, deposes and says: I am the counsel for G. & C. Merriam Company, the petitioner named in the foregoing petition; I have read the foregoing petition and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters I believe it to be true. The sources of my information and the grounds for my belief are a personal acquaintance with all the proceedings had and taken in this suit, including testimony and exhibits before the Special Master herein. The reason why this verification is not made by the petitioner is that said petitioner is a corporation, and not capable of making this verification, and is not within the county where affiant resides and has his office, and further the facts are not within the personal knowledge of any of the officers of petitioner.

WILLIAM B. HALE.

Sworn to before me this 21st day of January, 1914.

[SEAL.] JULIETTE WALLSTEIN,
*Notary Public, Kings County.*

Certificate filed in N. Y. Co., N. Y. County Clerk's No. 18.

42 EXHIBIT A.

*Agreement Between George W. Ogilvie, of New York, and The Saalfield Publishing Co. of Akron, Ohio (June 24, 1910).*

Agreement made this Twenty-fourth day of June, 1910, between George W. Ogilvie, of the City of New York, State of New York, who shall hereinafter be called the party of the first part, and The Saalfield Publishing Company, a corporation whose principal place of business is in the City of Akron, State of Ohio, which shall be called hereinafter party of the second part, witnesseth:

That, whereas, on the 14th day of April in the year 1908, said George W. Ogilvie and one Arthur J. Saalfield, trading under the firm name and style of The Saalfield Publishing Company, entered

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into an agreement whereby said Ogilvie leased upon certain terms and conditions therein contained, the rights of publication of four certain books or dictionaries known by and under names or titles as follows: to wit: "Webster's Imperial Dictionary," "Webster's Intercollegiate Dictionary," "Webster's Adequate Dictionary," and "Webster's Sterling Dictionary"; and

Whereas, The Saalfield Publishing Company, a corporation, has been formed under the laws of the State of Ohio, to succeed to, and said corporation has succeeded to all the rights, interests, contracts, etc. of Arthur J. Saalfield, trading as The Saalfield Publishing Company, including (with the consent of said George W. Ogilvie) the said contract between George W. Ogilvie and Arthur J. Saalfeld above referred to, and

Whereas, the contract having outlived its usefulness it is mutually agreed that certain changes ought to be had therein
43 and to simplify the matter that this new contract be substituted for and take the place of the contract of April 14, 1908,

Now, therefore, in consideration of the premises and the sum of one dollar ($1.00) by each of the parties to the other in hand paid, the receipt of which is hereby acknowledged, and for other valuable and different considerations mutually had by and between the respective parties, George W. Ogilvie, party of the first part, and The Saalfield Publishing Company, Incorporated, party of the second part, do covenant and agree with other as follows, to wit:

That said agreement heretofore referred to, made on the 14th day of April, 1908, be and it is hereby declared to be null and void.

That said party of the first part, who is the sole owner and proprietor of the electrotype plates and of the copyrights from and under which the said dictionaries, to wit "Webster's Imperial," "Webster's Intercollegiate," "Webster's Adequate" and "Webster's Sterling," are printed, hereby leases to the party of the second part the plates of said dictionaries, and grants to it the exclusive right to print therefrom during the life of the copyright of each of them, and to print, manufacture, make, bind, sell and deliver such product subject to the following terms and conditions, and as hereinafter modified.

The party of the second part covenants and agrees to pay the party of the first part for the use and hire of said plates and for such right of publication, a cash royalty which shall be equal to one-half (50%) of the profits accruing from the publication and sale of such dictionaries, and the profit shall be ascertained, fixed and paid as hereinafter provided, to wit:

44 It is agreed that the total cost of producing said dictionaries shall consist exclusively of the following items:

(A) The net cash cost of the paper contained in the dictionaries and the cost of printing and binding them, also the cost of the maps contained in the books and the cartons in which they are packed, as well as the cost of the colored plates in the "Intercollegiate Dictionary"; in short, the entire manufacturing cost of producing each



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of the dictionaries as it is sold to the public by The Saalfield Publishing Company.

(B) The net cash paid by The Saalfield Publishing Company for advertising in the mediums other than those published or controlled by The Saalfield Publishing Company, or in which it is interested.

(C) Commissions paid to agents for making subscription sales.

(D) The cost of making new duplicate dictionary plates from the shells necessary to replace those that become worn or damaged in the ordinary course of business and also the cost of making necessary alterations in the plates.

(E) Traveling expenses of either George W. Ogilvie or A. J. Saalfield Publishing Company, Incorporated, party of the second the sale of said dictionaries.

(F) Freight paid on said dictionaries by The Saalfield Publishing Company to Akron, Ohio, from either Hammond, Indiana, or Chicago, Illinois.

(G) The cost of sample or complimentary copies.

(H) Such trade cash discounts as are customary and allowances as are necessary.

(I) The cost of necessary circulars devoted to advertising said dictionaries exclusively.

45 (J) Freight or express charges paid by The Saalfield Publishing Company on returned dictionaries.

(K) Salary of one sales manager, or such proportion of it as is represented by the time devoted by him exclusively to the dictionaries which are covered by this contract.

The aggregate cost of items to be found enumerated from "A" to "K," inclusive, shall be deducted from the gross amount of dictionary sales, and the balance is agreed upon as and shall be considered to be the divisible profits.

The deduction of the cost of the items included in "A" shall be made only when and as sales are made of the books produced from the materials therein described, and deductions of the items included from "B" to "K" shall be only for expenditures during the period covered by the statement rendered.

It is further agreed that statements in the same style and manner as heretofore rendered under the contract of April 14, 1908, shall be made and rendered quarterly beginning with the first day of August, 1910, said first statement to show the royalty accrued from the first day of May, 1910, and that said royalty shall become due and payable and The Saalfield Publishing Company agree to pay the same as hereinafter provided.

Settlement to be made by notes accompanying the statements, rendered, as follows:

February 1st and May 1st statements: Three notes, each for one-third (1/3) of the amount shown by the statement about to become due, said notes to be payable in four (4) six (6) and eight (8) months respectively from the date of each statement, i. e., February 1st and May 1st of each year.

46 August 1st and November 1st statements: Three notes, each for one-third (1/3) of the amount shown by the statement about to become due, said notes to be payable in three (3) five (5) and seven (7) months respectively, from the date of each statement, i. e., August 1st and November 1st of each year.

The party of the second part covenants and agrees that it will publish Webster's Imperial Dictionary under special titles as heretofore and as occasion requires and also in three (3) editions, one to be called the "Trade Edition," which shall be the edition made and sold to that portion of the consuming public commonly known as "the trade," i. e., booksellers, wholesale and retail, exclusive of subscription book and premium houses, a second edition to be known as "Webster's Universal Dictionary" to be sold by subscription and to school supply houses, and that another or third edition of the Imperial Dictionary shall be made to be known as the "Premium Edition" to be sold for special purposes.

That the selling price of the "Trade Edition" of the said Imperial Dictionary shall be as follows:

For "Webster's Imperial Dictionary" and "Webster's Universal Dictionary" not less than Six Dollars ($6.00) less the following discounts for quantity.

Thirty per cent (30%) when ordered in lots of less than six (6) copies at a time.

One third (33 1/3%) if ordered in lots of from six (6) to forty-nine (49) copies at a time.

One third and five (33 1/3 and 5%) per cent if ordered in lots of fifty (50) to ninety-nine (99) copies at a time.

Forty per cent. (40%) if ordered in lots of one hundred (100) copies or more at a time.

An effort shall be made to maintain the foregoing schedule of prices for quantity, but it shall not be binding in that particular upon the party of the second part, thus giving them leeway
47 to sell less than one hundred (100) at one hundred copy prices or better where possible.

And the prices for the Russia and Turkey Morocco binding of said edition of said dictionary shall not be less than said Six Dollars ($6.00) plus two and a half times the additional cost of the respective styles of binding over the cost of the sheep binding, and that such prices as may be thus fixed for them shall be subject to the same discount as above mentioned for like quantities ordered.

And the selling price for said "Premium Edition" of the said dictionary shall not be fixed herein except as follows: that none of said dictionaries shall be sold at a price which shall show a gross profit thereon of less than Fifty cents ($.50) a copy, unless the party of the second part shall have first obtained the consent in writing of the party of the first part.

It is covenanted and agreed by and between the respective parties hereto that the selling prices of the abridged dictionaries known as the "Intercollegiate," "Adequate" and "Sterling" Dictionary, or any editions thereof for special purposes, are not to be fixed herein but left to the discretion of the party of the second part.

It is further stated and agreed by and between the respective parties that the ownership of the electrotype plates and the electrotype shells thereof and the copyright of the dictionaries herein named, and each of them, lies exclusively in the party of the first part, and nothing that is contained in this agreement shall be construed as a relinquishment or waiver of such ownership.

The party of the second part covenants and agrees to print, manufacture, publish and sell the herein-named dictionaries, and all of them, and to carry sufficient bound stock of each and every
48 dictionary comprising the series under any and all titles now in use to fill all orders received for all dictionaries with reasonable promptness, and it further agrees to push with vigor the sale of said dictionaries in connection with its general business, and to provide and allot space in all of its catalogs, and such other of its general publications as is expedient, and to advertise said dictionaries therein without charge.

It is expressly covenanted and agreed on the part of the party of the second part that no change shall be made in the present titles of said dictionaries without the approval and consent in writing of either George W. Ogilvie or Arthur J. Saalfield having been procured, to which the party of the first part hereby agrees.

The party of the second part covenants and agrees to maintain the present standard and quality of the herein-named dictionaries and each of them, so far as paper, printing and binding is concerned, and to keep the present arrangement of printed matter on the title pages of all the said dictionaries unchanged unless under the direction or with the approval and consent of the party of the first part which shall first have been obtained in writing.

The party of the second part covenants and agrees that all of the copyright notes now appearing in the dictionaries named herein shall be printed and appear in the same place as they now appear in each and every copy of each and every edition of all of said dictionaries printed in the manner and form in which the notes are now printed; and the said party of the second part agrees in addition thereto, to print in any of said dictionaries the notes required by law upon which a new or subsequent copyright shall be taken out and that any new copyright shall be applied for and secured in the name of the same person as the original copyright was se-
49 cured unless requested by notice in writing to follow some other method.

The party of the second part further covenants and agrees that no changes of any nature whatsoever shall be made in the plates of any of said dictionaries except that worn plates or plates damaged in printing may be replaced or mended, but in each of said cases the new plates or mended plates shall contain the exact words, etc. and all of them, as the original plates contained, except that it is mutually provided herein that new words that come into use in the English language may be added to the dictionaries, or to any of them, or like minor changes such as corrections, may be made therein which have first met with the approval of Arthur J. Saalfield, and for more extensive changes in any of the plates of said dictionaries the consent must be obtained, in writing, of the party

of the first part, and it is mutually agreed that such changes, if any, are to be copyrighted in the name of George W. Ogilvie in the Imperial Dictionary and Walter R. Benel in the said other three dictionaries, or in the name of whomsoever they may designate.

It is mutually covenanted and agreed by and between the respective parties hereto that the contract shall become terminable at the election of the party of the first part at once upon the failure of the party of the second part to carry out the conditions agreed upon herein or upon the discontinuance of business on the part of the party of the second part for any cause whatsoever, or upon the severance of the present active and actual managerial connection of Arthur J. Saalfield with the party of the second part either by death, resignation or otherwise, one of the objects of this contract being to secure the business ability and acumen and experience of
50 Arthur J. Saalfield in connection with the sale of the dictionaries covered by this contract, and that the party of the second part may not transfer, assign or sell to any other person, concern, corporation or partnership, or in any manner whatsoever divest itself of any or all the rights accruing to it by virtue of this contract to or for the benefit of any other person, concern, corporation or partnership without first having obtained the consent in writing of the party of the first part, and any transfer, assignment or sale or agreement made contrary to this provision shall be null and void.

As a further consideration to the party of the first part for the rights and privileges granted under this contract to the party of the second part, The Saalfield Publishing Company Incorporated, agrees in the event of the exercise of the option by the party of the first part to cancel this contract to furnish to him without delay, a complete list of their customers for, the quantities purchased, and the prices at, and terms on, which these said dictionaries or any of them have been sold to said customers; and to sell to the party of *of* the first part at actual cost of production all of the stock on hand of any or all of said dictionaries and to permit an examination of the books of the corporation, at any time during business hours for the purpose of verifying the statements rendered under this contract.

That party of the second part hereby agrees to fully and fairly comply with all the conditions contained in the injunction secured against George W. Ogilvie, by G. & C. Merriam Company in the United States Circuit Court, First Judicial District, and any expenditures necessitated or penalties incurred by reason of a breach of this covenant shall not be charged to the cost or production hereinbefore mentioned, *by* shall be borne in whole by the party of the second part, and any expense in connection with suit started vs. The Saalfield Publishing Company by G. & C. Merriam Company for
51 other reasons in connection with these dictionaries shall be borne by the party of the first part.

It is mutually agreed that in the event of the sale by the party of the first part of his rights under this contract, The Saalfield Publishing Company shall have the first option to purchase the same at any price that can be obtained for them from any other person, firm or corporation.

And lastly, it is covenanted and agreed by and between the respective parties that this contract shall take effect and become enforceable immediately upon the execution by the parties hereto.

In Witness Whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed, the day and year first above written.

(Signed) GEORGE W. OGILVIE.
THE SAALFIELD PUBLISHING COMPANY.
(Signed) By A. J. SAALFIELD. [SEAL.]

In the presence of—

(Signed) F. M. BELDEN.
(Signed) A. S. HIBBS.

52 THE UNITED STATES OF AMERICA,
*Northern District of Ohio, ss:*

*Marshal's Return.*

Received this writ at Cleveland, Ohio, Jan. 22, 1914, and on the same day at Akron, Ohio, I served the within named, The Saalfield Publishing Co., by Arthur J. Saalfield, President of said The Saalfield Publishing Co., /personally, a true and certified copy hereof, with all endorsements thereon; at the same time and date I served Arthur J. Saalfield, personally, a true and certified copy h-reof, with all endorsements thereon.

CHAS. W. LAPP, *U. S. Marshal.*
By AL. P. KELLEY, *Deputy.*

Marshal's Fees:

| | |
|---|---|
| Service Petition ..... | $2.00 |
| Travel Pet. ..... | 2.46 |
| Service Ct. Order..... | 2.00 |
| Travel Ct. Order..... | 2.46 |
| Service Petition ..... | 2.00 |
| Travel Pet. ..... | .06 |
| Service Ct. Order..... | 2.00 |
| Travel Ct. Order..... | .06 |
| | $13.04 |

Filed Jan. 23, 1914. B. C. Miller, Clerk, U. S. District Court, N. D. O.

53 (*Motion to Quash Subpœna and Set Aside Proceedings, Filed Jan.* 31, 1914.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 27.

Motion.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Now comes George W. Ogilvie, defendant in this cause and, not admitting the jurisdiction of the court over him in the above entitled cause and for the purpose of objecting to the exercise *of* this court of any such jurisdiction, moves the court that the writ of subpœna issued by the Clerk's office of said court on the 16th day of December, 1912, which has not been served upon him as the law requires, may be quashed, that all judgments and proceedings based thereon may be set aside and held for naught, as to him, for want of jurisdiction.

By his Solicitors, Calfee & Fogg, who appear specially for the purpose of raising the question of jurisdiction, and that alone.

CALFEE AND FOGG,
*Attorneys for George W. Ogilvie.*

We acknowledge service of the above motion by copy this — day of January, 1914.

——— ———,
*Solicitors for G. & C. Merriam Company.*

54 (*Notice of Motion to Set Aside Proceedings With Affidavit of Service. Filed Jan.* 31, 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Notice of Motion to Set Aside Proceedings.

The complainant will take notice that the motion hereto annexed will be for hearing on Monday, February 2, 1914, at 10 o'clock, A. M., or as soon thereafter as the court will hear the same.

CALFEE AND FOGG,
*Attorneys for George W. Ogilvie.*

We accept service of the above motion by copy this — day of January, 1914.

——— ———,
*Attorneys for G. & C. Merriam Company.*

UNITED STATES OF AMERICA,
*Northern District of Ohio, Eastern Division,*
*State of Ohio, County of Cuyahoga, ss:*

***Affidavit of Service.***

John F. Wilson being first duly sworn on oath says that on the 31st day of January, 1914, he served the within notice & motion by leaving a true copy of both notice & motion with James A. Ford, personally; & that said James A. Ford is the attorney of record for The G. & C. Merriam Company.

JOHN F. WILSON.

Sworn to before me & subscribed in my presence this 31st day of January, A. D. 1914.

[SEAL.] M. W. SPEAR,
*Notary Public.*

55 (*Order Extending Time to File Narrative Form of Testimony. Entered May 25th, 1914, by Judge Killits.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD et al.

For satisfactory reasons appearing to the court, the time for filing the record in this cause in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the 28th day of June, 1914.

Additional portions of record may be offered for incorporation in the record at any time before June 7th, 1914 by any of the parties.

56 (*Order Approving Testimony. Entered June 9th, 1914, by Judge Killits.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD et al., Defendants.

This day came the plaintiff, by its attorneys, and presented to the Court, his certain narrative form of the testimony taken at the final hearing of this cause, which being found by the Court to be true, is allowed, signed and sealed and is ordered to be filed in this cause.

57 (*Testimony. Filed June 9, 1914.*)

O. K.
CALFEE & FOGG.
W. B. HALE.
JAMES A. FORD.

District Court of the United States for the Northern District of Ohio, Eastern Division.

In Equity. No. 27.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, et al., Defendants.

*Appellant's Statement of Testimony in Narrative Form Taken on Motion to Quash, under Equity Rule No. 75.*

W. B. Hale, J. A. Ford, Counsel for Complainant-Appellant.
May 15, 1914.
Lodged in Clerk's office for inspection of Defendant.
R. C. DEAN,
*Deputy Clerk.*

58 Appearances:

William B. Hale, Esq. (New York), James A. Ford, Esq. (Cleveland, Ohio), representing the complainant herein, G. & C. Merriam Company; and

Messrs. Calfee & Fogg, (Cleveland, Ohio) representing George W. Ogilvie, specially for the purpose of objecting to the jurisdiction of the court upon defendant Ogilvie.

Be it Remembered, That the February Term of Court, to-wit: on Saturday, February 7th, 1914, before the Hon. William L. Day, one of the judges of the United States District Court for the Northern District of Ohio, at Cleveland, Ohio, on motion of defendant, George W. Ogilvie, to set aside service of subpoena and quash all subsequent proceedings had thereon, the following proceedings were had:

Whereupon counsel for George W. Ogilvie, to maintain the issues on their part, called as a witness in their behalf, CHARLES R. MILLER, who, being first duly sworn, testified as follows:

Direct examination by Mr. CALFEE:

My full name is Charles R. Miller. I am a member of this bar. I think I was admitted to this Court some time in the year 1880; I was admitted to the Supreme Court of Ohio on the 3rd day of December, 1879.

In the case of the G. & C. Merriam Company vs. Arthur J. Saalfield, in the United States District Court, Northern District of Ohio, Eastern Division, I acted as associate counsel for Mr. Bean of Boston. Early in January, 1909, Mr. Bean, whom I have known for a great many years, came to our office and consulted me about this
59 case. After looking up the papers that he had and the decisions that had been rendered on this subject in the various actions that have been brought by the Merriam people against other defendants, I gave him my views of the case and told him what, in my judgment, should be the defense; and Mr. Bean then left and went to Boston. An answer was prepared in accordance with the lines agreed upon that day and it was filed, and I entered an appearance on behalf of the defendant, Mr. Saalfield. I have a copy—a carbon copy, of that appearance. This carbon copy which I have, bears date of January 30, 1909. The original was signed by the firm name of Weed, Miller & Nason. The firm of Weed, Miller & Nason dissolved about five years ago, approximately; I can't give the exact date. Of the firm of Weed, Miller & Nason, I had charge of the litigation in the case of The Merriam Company against Saalfield. I was paid by Mr. George F. Bean, of Boston. I rendered my bill to Mr. George F. Bean. I was connected with the case, as representing the defendant actually up to the time of the preparation of the brief for The Court of Appeals. After that I had no further connection with it. My last charge is March 2, 1911. In the argument on the re-hearing in The Court of Appeals I did not appear. I don't know whether my name is on the brief or not. I had no connection, whatever, with the re-argument. I think I did not have any communication directly or indirectly with counsel for the complainant, The Merriam Company, from the time the case first went to the Court of Appeals until in September 1912. In Sep-
60 tember, 1912, at which time the final decree was entered in this Court, upon the receipt of the mandate from the Circuit Court of Appeals, I was in the court before Judge Day in another matter. I think the Judge will recall that I said to him that this notice had been served upon our office, that an application would be made for an entry of a final decree, and that I was no longer connected with the case. The Judge said to me: that Mr. Sieber, of Akron, would represent the defendant, and I think the Judge said that he had a telegram from him saying that he would be here after luncheon. I remember further saying to the Judge that I thought, from reading the opinion of the Court of Appeals, that they had indicated what kind of a decree should be entered herein. Subsequent to that conversation in 1912, but prior to the time the attempted service of summons was made upon me in the latter part of December, 1912, I had no connection, direct or indirect with this case, none whatever. The statement I have referred to, as having been made to Judge Day in September, 1912, was made in this room here.

Mr. CALFEE: You may inquire.

MAJOR MILLER: I think the Court ought to be advised of the fact, that when this attempted service was made upon me, I called up the Clerk of The United States Court, Mr. Miller, and told him that I

no longer represented The Saalfield Publishing Company; and I think I subsequently wrote him a letter to that effect; and I subsequently formally withdrew the appearance which I had entered in the case; so that Mr. Hale might not be misled; and when
61 the final decree, or whatever it was, some notice of a final hearing before the Master was served on me, I again called up Mr. Miller, the clerk, and told him; that I did not feel that Mr. Hale ought to go on with this matter without being advised of the fact that I did not represent the defendants in this case.

Cross-examination by Mr. HALE:

My actual connection with this case ceased prior to argument in the Circuit Court of Appeals in Cincinnati. I cannot tell you the date when I filed my formal withdrawal in the clerk's office. I did, however, file a formal withdrawal in the Clerk's office on the date shown by the record. After this date I had nothing whatever to do with the case. At the time I was served with an order for services of subpœna, and an order to show cause in this case, I mailed them to Mr. Bean, of Boston, at once. After the decision in the Circuit Court of Appeals, I did not have any further communication with Mr. Bean with reference to further employment. Some time in August 1912 I may have received a letter from Mr. Bean advising me of the decision. I have a letter from Mr. Bean dated August 29, 1912.

Mr. HALE: I would like to read in evidence the letter of August 29, 1912.

"Charles R. Miller, Esq., Century Building, Cleveland, O.

"My Dear Mr. Miller:

"It has been a long time since any correspondence has
62 passed between us in the case of Merriam vs. Saalfield because there really has been nothing which needed to be said.

"I am sorry to say, however, that the Court of Appeals has not stood with us at all in that case. As you probably know, that Court reversed Judge Tayler last October and ordered an injunction against Saalfield in the form of an injunction against Ogilvie in this circuit, but said that the matter of an accounting was beset with difficulties, and indicated that the complainant might ask for a rehearing on that question, which rehearing was of course asked for and the matter of an accounting was argued before that court in June last.

"The Court of Appeals (made up at this time of Warrenton, Knappen and Denison) has now ordered an accounting and undertaken to prescribe the rules for and the limits within which such accounting shall be had. Judge Knappen was the only judge at the last hearing who sat at the former one.

"In due course I understand the mandate will go down to the District Court September 5. Hale, attorney for the Merriam Company, has written that he has noticed the hearing for settlement of decree for September 9. Do you know, or can you ascertain and inform me, whether the Court will sit at that time, or, if not, when

there will be a sitting, so that the matter could come up? I think it likely that I shall go to Cleveland for the hearing on that matter.

63 "Such is the situation in this case at present. As you know, Ogilvie has been required under his contract with Saalfield to defend the case thus far. He claims that from now on the defense rests with Saalfield under the terms of their contract. I do not know as yet to what extent Saalfield will defend the case. It looks as though the taking of testimony on the question of an accounting would take counsel to various parts of the country thus covering much territory and also a long time.

"I have heard from Saalfield today for the first time, and he stated in a general way that he wants me to take charge of the matter, and he expects to be here in Boston next Monday. I hope therefore to have a full conference and understanding with him and I shall endeavor to arrange with him that as far as I may desire I may avail myself of your assistance. Will you kindly inform me by return mail so that if possible I shall have heard from you by the time I see Mr. Saalfield on Monday whether you are to be at home from now on and if I can call upon you.

"Hale has submitted a form of decree which I do not believe the Court will ever enter unless it is uncontested. I shall have a form of decree, which I believe will strictly follow the opinion and mandate. It may be that I shall want to send you a copy of Hale's and my form of decree with a brief statement in support of mine and ask you to appear at the hearing on the settlement of the decree.

"Hoping for your prompt reply, I am."

——— ———.

64 As to the reference, embraced in the words, "As you know, Ogilvie has been required under his contract with Saalfield to defend the case thus far," I only know that at the time Mr. Bean called upon me first in this case, he told me then that Mr. Ogilvie had some contract or arrangement with Mr. Saalfield, or The Saalfield Publishing Company, by which he was to bear the expense of certain litigation.

Prior to the time when my activity in connection with the case ceased, I think I had over the telephone a conversation with Saalfield concerning this case, very early in its inception.

Redirect examination by Mr. CALFEE:

I did reply to the letter of August 29, 1912. I have a copy of my reply to Mr. Bean,—a carbon copy. This is it, under date of September 3, 1912.

Mr. CALFEE: I introduce this in evidence as "Defendant's Exhibit 1."

I have a copy of the notice I referred to as having been served upon me by Mr. Ford, relating to the settlement of the decree in September, 1912.

The copy on file in this Court purports service to have been ac-

knowledged by Weed, Miller & Rothenberg by W. R. Miller. W. R. Miller is my son. I was not in the office at the time that was served. W. R. Miller did not have any connection with this litigation, or know anything about it.

65 The COURT: He is regularly employed in connection with your firm.

The WITNESS: He is a member of our firm.

It was in connection with this notice that I made the statement in open court before Judge Day, that I was no longer connected with this litigation.

Recross-examination by Mr. HALE:

As to whether subsequent to the service of the order for substituted service of the subpœna, I was served with notice of an application for a preliminary injunction upon the supplemental bill. I don't remember, it seems to me the two papers came to me by mail from the Clerk. As to whether immediately prior to the filing of my formal withdrawal in the Clerk's office, I was served with notice of motion for a preliminary injunction. I don't recall, that may be so. If so, I mailed all papers to Mr. Bean, of Boston. The letter of December 17th was transmitting to Mr. Bean the papers which I received. I did receive a reply to that letter under date of December 26th.

Witness reads letter into the record, which letter reads as follows:

"Dec. 26, 1912.

"Charles R. Miller, Esq., Cleveland, O.

"DEAR MR. MILLER: I received your favor of December 17th, including some papers served upon you by the United States
66 Marshal and I was served with copies of the same papers by the marshal of this district.

"Can you conceive any basis upon which proper service can be had upon Ogilvie in this suit so as to make him a party to it? Neither you nor I was ever his attorney of record in the Sixth Circuit. It is true that under a contract with Saalfield he defrayed some of the expenses of that suit, but I did not conceive that that would make him subject to your jurisdiction of the United States Court for the Sixth Circuit, even if the service were made upon him personally in the district where he lives and does business, viz., the Second Circuit.

"I do not expect that Ogilvie will pay any attention to the suit. At any rate, he has not authorized or does not expect me to. I have not seen the supplemental bill, nor Hale's affidavit attached to it. Ogilvie is not disposed at present to even have a special appearance filed for him so as to plead to the jurisdiction. While the Court has issued the order for substituted service upon Hale's motion, I cannot believe that on the record it will be held that Ogilvie is properly before the court as a defendant.

The COURT: This notice that he speaks of in that letter, has that notice any connection with this question we have before us?

Mr. HALE: That was the foundation of your order, providing that service might be made upon Mr. Miller and Mr. Bean, of Boston.

67 Mr. HALE: The date of the formal withdrawal of Mr. Miller, as solicitor, was filed in the Clerk's office January 25, 1913, as appears from the records; and I offer that in evidence as "Plaintiff's Exhibit A."

Mr. CALFEE: I object to his description of the paper. We admit the date of the paper is of January 25th.

Mr. HALE: I offer the paper in evidence, in connection with Mr. Miller's testimony.

The COURT: It may be received.

The COURT: This letter of Mr. Bean's was dated December 26, 1912, and the letter of Mr. Miller's transmitting this notice, was December 17, 1912.

Mr. CALFEE: Correct.

68 And further to maintain the issues on the part of the defendant, George W. Ogilvie, counsel called GEORGE F. BEAN as a witness, who, being first duly sworn, testified as follows:

Direct examination by Mr. CALFEE:

My name is George F. Bean. I am an attorney at law. My residence is in Woburn, a suburb of Boston, and I practice law in Boston, and have since 1886. I was counsel for Arthur J. Saalfield, defendant in the case of The G. & C. Merriam Company vs. Saalfield, in the Northern District of Ohio, Eastern Division, in case No. 7683.

My recollection is that that suit was entered sometime in December, 1908, and my appearance of record in the case was some time early in 1909. As a matter of fact, I think there was no formal appearance through an oversight by myself; but since that the answer was filed with my name on as counsel for defendant. I was, formally admitted to practice in this District, I think at that time. I believe I remember paying the fee.

Shortly after this suit was instituted, I cannot say whether in December, 1908, or January, 1909, I received a letter from Mr. Ogilvie written from some point here in the West, I don't know whether from Chicago, or Akron or Cleveland, or where, telling me that The Merriam Company had started suit against A. J. Saalfield. He did not go into any particulars in that letter—I have not got the letter, it has been destroyed. I might say, that at that time I was counsel for Ogilvie in a suit which he brought against The

69 Merriam Company in the First Circuit in 1904, and which was still pending in December, 1908, and was not finally disposed of until the summer of 1909. A few weeks, after receiving that letter, Mr. Ogilvie came to Boston, and he told me in substance, that he was under contract with Saalfield—of which I had heard

nothing, and the terms of which I knew nothing until I saw some papers attached to this case; but under the terms of the contract he was required to defend Saalfield in any litigation, if any were brought against him; and he wanted me to take charge of the litigation, as I was then in charge of litigation for him in the First Circuit involving substantially the same questions. I think he told me that he had been to Akron to see Mr. Saalfield, and it was their joint desire that he do that. That is my recollection of it. In consequence of my talk with him, I shortly after that came to Cleveland; but before that, I think I had written to Major Miller I was coming, and would pay him a visit and confer with him and his partner, Mr. Weed, both of whom I had known for a long time, and retained them, in conjunction with myself, to appear for Mr. Saalfield and conduct the business.

After the visit I prepared an answer in the case, which was submitted, as I recall, to Major Miller, and in due course filed by him. It seems, from what he testified, he entered his appearance and mine, which might be inferred from the fact that my name was on the answer. That case was, I suppose, first heard on a motion for a preliminary injunction made by the complainant, which hearing was, by stipulation, made a final hearing, that was heard before Judge Tayler, who subsequently rendered a decision dismissing the bill.

70 I prepared a form of decree and sent it here, which, I think, Major Miller presented at my request. That is only my recollection of it, as I was not here, and cannot say who was in court. And the decree, which I prepared and sent here was entered. Thereupon the complainant took an appeal to the Circuit Court of Appeals, and the case was argued in Cincinnati by me alone. Major Miller's name was on the brief I prepared and sent to him, as I recall it, but he did not go to Cincinnati to my knowledge in connection with the case at any time.

Following the decision of the Circuit Court of Appeals, the complainant argued for a re-hearing, and I asked leave, and was given time to file a brief in opposition to a re-hearing, which brief I filed. The Court granted a re-hearing on the question of accounting. Subsequently in June, 1912, the case was finally argued at Cincinnati by myself. Major Miller did not appear therefor. The Circuit Court of Appeals handed down a decision, upon which a mandate came to this Court, as I understand, September 5, 1912.

My active participation in the case ceased; and by active I mean appearances in court or formulating any proceedings which subsequently ensued, with the argument in the case at Cincinnati the second time. I had not then, or up to that time, seen the contract between Mr. Ogilvie and Mr. Saalfield, and as Mr. Ogilvie had told me first, it was incumbent upon him to defend Saalfield, he, in substance, told me, after the decision, in Cincinnati, that he was no longer obligated to support the defense or pay for it or any part of it.

71 I did nothing after the decision in Cincinnati, until some time in August, when I heard from Mr. Saalfield. I might say that when Mr. Hale read that letter of August 29th, in

that letter I said, "That was the first time I had heard from Mr. Saalfield." I mean that was the first time I had heard from him since the decision. I heard from him a great many times before that in various combinations, personally and by letter. I don't know whether I wrote him, or whether he first wrote me about the decision; but as a result of our correspondence he met me; he came to Boston and I met him there, and we discussed on two or three different days the matter, and what should be done thereafter. Mr. Saalfield went in conference with me, and told me he wished me to continue in the defense of the suit so far as was necessary. He did not want to be involved in a very heavy expense, I inferred from his conversation; but he wished me to take charge of it, and he left Boston with that statement to me. I at that time prepared a form of decree, which I conceived to be in accordance with the mandate of the Court, and sent it to Mr. Sieber, who, by the way, was in Boston on one of the days in conference with me and Mr. Saalfield. I sent it to Mr. Sieber here in Cleveland at some hotel where I had been told by him he would be; and I think I sent it in season for that hearing, which I understand was September 9th. Subsequently I heard from Mr. Sieber as to the Course of his argument in settling the decree. I had a telegram from him, which I think you have got (addressing Mr. Calfee), saying that he would attend to it, but expressing the wish I would be here if possible. But I could
72 not be here; so I wired him (I think you have my telegram (addressing himself to Mr. Calfee), saying I could not come. He gave me the substance of the matter, and told me the question was taken under advisement by the Judge. I didn't see the decree, but I heard the substance of it substantially.

I can't remember exactly, but I think I heard from Mr. Sieber, that Mr. Saalfield had concluded, for reasons which were satisfactory to himself, and which were satisfactory to me, to have Mr. Sieber attend to the matter, which would be more convenient for him to do, than for him to be continually coming back and forth from Boston here.

Thereafter I rendered a bill to Mr. Saalfield for the balance of my charges in the matter, which he paid. I rendered that bill sometime early in December, which he paid immediately thereafter.

My deposition was taken in Boston, and I furnished a copy of the bill which I rendered Mr. Saalfield. This paper bearing date of December 11th, which purports to be a copy, is a correct copy of that bill. I think it is, no doubt it is. I did accompany that bill with a letter,—it is my recollection that I did. That is a copy of my letter bearing date of December 11, 1912.

Mr. CALFEE: I offer this carbon copy of the letter in evidence as "Defendants' Exhibit 2."

I received a reply to that letter from Mr. Saalfield. That is the reply to my letter of December 11th.

Mr. CALFEE: I offer this letter of December 19, 1912, in evidence, as "Defendants' Exhibit 2," which reads as follows:

73 "AKRON, OHIO, 12/19/12.

"Mr. Geo. F. Bean, 176 Federal St., Boston, Mass.

"DEAR MR. BEAN: I received your letter the other day, and likewise bill for services, and therefore enclose herewith my check for the amount.

"I also wish to state that I intended to write to you several times, but as there was nothing definite to report, as no settlement had been made until very recently, I let the matter go by.

"My settlement with the Merriam people was mainly on the accounting, and does not affect the decree. It gives me full right to sell all our books as long as we live up to the decree, without any further interference or incurring liability.

"Wishing you the compliments of the season, I beg to remain.

Very respectfully yours,

THE SAALFIELD PUBLISHING COMPANY,

(Signed) "Per A. F. SAALFIELD."

That letter contained a check for my services. For my services which appear by this bill to have been rendered in the months of August and September, 1912. Thereafter I did not have any connection with this case. Absolutely none.

Mr. CALFEE: I offer this bill in evidence as "Defendants' Exhibit No. 4." You may inquire.

74 Cross-examination by Mr. HALE:

In my letter of December 11, 1912, to Mr. Saalfield, I state, "I am therefore sending you a bill for my retainer and services, to which I will be glad to have you give your early attention." And this bill, which has been offered in evidence, covering my services in August and September, 1912, is the bill referred to in that letter. All those services were rendered, as the bill states, in August and September. The services are detailed in the bill. The amount of the bill, $150.00, is a fair estimate of the amount of services which I rendered in that case, during that period of time, if I am correct in estimating the value of my services. I never rendered any other bill to him or Mr. Ogilvie, except that one. I got money from both of them, Ogilvie and Saalfield I got it by asking for it. I did ask Mr. Saalfield for money by letter, but I cannot tell you when. I asked him for money in Boston, and again I requested money of him in Akron. Saalfield did send me money for services in this case. Mr. Ogilvie did also. When I paid Mr. Miller any money it was undoubtedly from money which I had received from Mr. Ogilvie, but whether it was received when the bill was presented or not, whether before or after it.

Upon authority of Mr. Ogilvie I retained Lawrence Maxwell of Cincinnati to assist me. As to who paid Mr. Lawrence Maxwell for his services, as I told you Thursday, I am not perfectly clear, but I think I got a bill and sent it to New York, and it was paid

from there. I mean I sent it to Mr. Ogilvie. As to whether
75 or not I told Mr. Maxwell that Mr. Ogilvie was back of it, I don't think I told Mr. Maxwell anything about it, but I don't know whether I did or not; he was only employed for argument at that stage of the case, and only on the question of accounting.

I did receive from the Marshal a copy of the subpœna on the supplemental bill, and the order to substitute service—I presume that is the title in the papers I received. I think I sent both sets to Mr. Ogilvie, after they were served upon me as attorney for Mr. Ogilvie. I would naturally send them to him, or I wrote him I had received them, I don't know which. I did that probably in a few days. I think I had a letter from him referring to it, that is my recollection. I wrote the letter of December 19, 1912, to Mr. Ogilvie. I have no doubt I did. These are all carbon copies. They were furnished by me from my office. These are carbon copies unsigned. I don't think I have the original letter.

Mr. HALE: I offer a copy of this letter in evidence as "Plaintiff's Exhibit B," which reads as follows:

"December 19, 1912.

"George W. Ogilvie, Esq., Waldorf-Astoria, New York, N. Y.

"DEAR MR. OGILVIE: Mr. Hale has started in again, naming both you and Saalfield and The Saalfield Publishing Com-
76 pany as defendants, as is evidenced by the enclosed copy of order for substituted service and copy of subpœna which I have received this morning. I received these papers from Mr. Miller and also a duplicate set were served upon me by the United States Marshal here.

"Not having my copy of the supplemental bill which has been filed, I, of course, can only guess what it is about, but, judging from what Mr. Sieber wrote me in the letter which you have, I assume that it probably has to do with the smaller dictionaries only.

"I have written Mr. Hale asking if he has a copy of the supplemental bill which he can furnish to me.

"You need not return these papers, as I have duplicates of them.

"Hastily yours,"

——— ———.

I wrote that letter, and the statement that I sent the papers referred to in that letter to Mr. Ogilvie, is true; I have no doubt it is, it is my recollection I sent them. Upon the letter now shown me that is my signature, and I wrote that letter to the clerk of this court.

Mr. HALE: I offer in evidence two paragraphs of this letter. I will read the paragraphs, as follows, under date of September 10, 1913:

"I understand that a hearing is to be had, or is being held before you as Master in connection with a supplemental bill of G. & C. Merriman Company v. Arthur J. Saalfield. This supplemental bill, I suppose, to be supplemental to an original bill filed by the Merriam

Company against Saalfield in the District Court for the
77 Northern District of Ohio, in which case I appeared for the defendant Saalfield, representing him both in the District Court, and subsequently in the Circuit Court of Appeals.

* * * * * * *

"I am writing this letter to say that notice of the hearing before you served upon me, attorney as for Ogilvie, has received no attention from me, because I am not, and never have been his attorney of record in the litigation in the Sixth Circuit, and he was not a party to that litigation. I thought it best that you should know this fact, and that notice on me was not notice to Ogilvie, nor has he received any notice through me of the proceedings in connection with the above named supplemental bill, and you should govern yourself accordingly."

The explanation of my former statement is that I forgot it. I thought you said they were both in the same month, and I supposed at the time when I drew that up that it was the only one I had; I had no recollection I had ever sent it to him. The Master has spread this letter upon the record in the proceeding before him. It is not true that I had not notified Ogilvie of the subpœna. It is undoubtedly true that I was wrong. The letter, then, which is in the Master's record may be disregarded, so far as that point is concerned. I was wrong when I wrote that letter; it was several months afterwards when I wrote that letter, and I was speaking from recollection. Ogilvie did get prompt notice. He had that notice from me of
it. As I testified in Boston, I destroyed along with a good
78 many other papers, practically all the correspondence. I don't remember the month, but I threw them away, because there was a great mass of correspondence accumulated, and I threw it away at one time. So practically the papers and letters which I did produce were all subsequent to the proceedings in Cincinnati. I Produced in Boston only one letter antedating the hearing in Cincinnati; that was the only one I could find. There were a great many, but they seemed of slight importance to me, and I threw them away. As to any authority from Mr. Saalfield to employ Major Miller as solicitor in this case, I had only the authority which I have described. I thought after talking with Mr. Ogilvie, and his telling me of his talk with Saalfield, and he gave me the case, I employed then whom I saw fit.

The COURT: Were you attorney for Ogilvie when you first heard from Saalfield?

The WITNESS: I was attorney for Ogilvie when this suit was brought against Saalfield, and I heard of it through Ogilvie. One case lapped over the other for about six months.

The COURT: Did you write this letter of December 26th to Major Miller:

The WITNESS: Yes.

I did testify thus in Boston: "Who retained Mr. Miller of the firm of Weed, Miller & Nason to act in the Saalfield case. "I did." "Q. At whose instance or request?" "A. On my own motion." "Q. Who gave you authority to do so?" "A. Nobody gave me

specific authority." "Q. Under whose general authority did
79 you act?" "A. I was asked to take charge of the case in behalf of Mr. Saalfield by Mr. Ogilvie." "Q. That was your retainer in the case?" "A. I was employed to take charge of the defense by Mr. Ogilvie." Mr. Ogilvie paid a part of my fees and Mr. Saalfield a part. The date of the first check I received from Mr. Ogilvie on account of my services in this case, I can't tell you. I think I got some money from him before I went to Cleveland; my impression is he gave me a check or some money when in Boston, but I am not sure. I think the first check from Mr. Ogilvie was received perhaps within two months after its institution, and about the time I went to Cleveland and saw Mr. Miller. That is correct. I don't know as it is a check, it may have been currency.

I did report progress in regard to this case from time to time to Mr. Ogilvie. I reported it to him. I wrote him frequently about the case as it went along. Whenever there were matters of importance, or something worth while happened, I reported to Mr. Ogilvie, whenever I desired. I did not similarly report to Mr. Saalfield, not as much. I wrote him some, but Mr. Ogilvie knew more about the facts of the case than Mr. Saalfield did.

Q. I asked you this question in Boston: "Did you make similar reports to Mr. Saalfield," and you answered, "I occasionally wrote him, but more often to Mr. Ogilvie than to Mr. Saalfield." Is that correct?

A. Yes, I wrote both more than I saw them.

The COURT: You knew there was an accounting going on involving Ogilvie?

80 The WITNESS: I didn't know anything at all, only what I might infer from the papers served; I had no knowledge of it.

As to whether at any time Mr. Ogilvie notified me, in substance, that he would no longer be responsible for my fees on account of services in this case: He did not notify me in that language; he notified me that he regarded that his obligation to Saalfield to defend li*gitat*ion terminated in the Court of Appeals, that it was no longer necessary to pay the bills, or any part of them.

For services rendered after that date, I rendered a bill to Mr. Saalfield, which he paid. I rendered that bill which you have in evidence. That is the only bill I rendered either one, except to ask for money occasionally, if you want to call that a bill.

The letters marked in Boston, Exhibits 3, 4, 5, 6 and 7 and now shown me I can identify as letters which I received from Mr. Ogilvie. I have no doubt these are the same ones I handed you in Boston—I recognize the handwriting. I am familiar with the handwriting of Ogilvie, and I know this to be his signature, no doubt of it. In reply to the letter to Mr. Ogilvie of December 19, 1912, in which I say: "Hale is starting up again," I received this letter from Mr. Ogilvie, because it begins with, "I have yours of the 19th inst."

Mr. HALE: I offer this letter in evidence as "Plaintiff's Exhibit C."

The COURT: It may be received.

The paper now shown me is a copy of a letter written by
81 me to Mr. Ogilvie. I can't say whether it is an answer to this letter from him, but it is dated January 21st.

Mr. HALE: I offer this in evidence as "Plaintiff's Exhibit D." I also offer in evidence letter which has been identified by the witness, and dated January 22, 1913, as "Plaintiff's Exhibit E." I also offer in evidence a letter which has been identified by the witness under date of January 24, 1913, as "Plaintiff's Exhibit F."

I also offer in evidence letter which has been identified by the witness, under date of December 25, 1912, as "Plaintiff's Exhibit G."

I also offer in evidence letter which has been identified by the witness under date of September 8, 1913, as "Plaintiff's Exhibit H."

Mr. HALE: That is all.

Mr. CALFEE: I offer the rest of this correspondence, as "Defendant's Exhibits 5 to 14, inclusive.

And further to maintain the issues on the part of the defendant, George W. Ogilvie, the attorneys for said defendant called GEORGE W. SIEBER, as a witness, who, being first duly sworn, testified as follows:

Direct examination by Mr. CALFEE:

My name is George W. Sieber. I am an attorney prac-
82 ticing at this bar. The paper which is marked "Notice," and filed in this case, No. 7683, purporting to have been sent me by Mr. Ford for the G. & C. Merriam Company, was served on me. It came by mail, I think, from Mr. Ford. The paper which purports to be a bill of cost in 7683 was served on me. I did appear in connection with this matter. I was counsel for A. J. Saalfield in opposition thereto. The bill refers to all the costs in the case, both in this court, and the two cases in the Court of Appeals. I think they are all included. I had appeared prior to that in this case as attorney for Saalfield. My first appearance, as I recall, was in connection with the settlement of the decree, which was in September. Mr. Hale, appeared in opposition to me at that time. At that time I was representing Arthur J. Saalfield. I went to Boston with Saalfield August 31, 1912, and on Sunday, the first Sunday we got there, we had a conference with Mr. Bean. After the decree was finally settled I appeared for Saalfield. No one else appeared or had anything to do with the litifation for Saalfield, after September, 1912, except myself. I was served with notice of an application on behalf of the complainant for leave to file a bill which was heard in the Circuit Court of Appeals about March, 1913. That was for an order, nunc pro tunc. Service was made upon me by Mr. Hale and Mr. Ford, as representing Saalfield, that is my recollection. I conducted the negotiation, in the settlement of all the question- of damages relating to this matter for Saalfield with the G. & C. Merriam Company as attorney for Saalfield. Neither Mr. Bean nor Mr.
Miller appeared in any way or had anything to do with the
83 settlement of that matter for Saalfield, nor did they know anything about it. That is the settlement by which the

judgment as against Saalfield, was released and cancelled. That agreement for the release of the judgment was entered into at the time the date appears as of December 6, 1912.

Mr. CALFEE: You may inquire.
Mr. HALE: I have no questions to ask.

84 And further to maintain the issues on the part of the defendant, George W. Ogilvie, the attorneys for said defendant called JAMES FORD as a witness, who, being first duly sworn, testified as follows:

Direct examination by Mr. CALFEE:

My name is James Ford.

Q. There appears upon the docket of this court, under date of March 13, 1913, a certified copy of an order from the Circuit Court of Appeals to allow the complainant to file his supplemental bill of leave, nunc pro tunc, as of December 16, 1912. Did you file notice of your application in the Circuit Court of Appeals, or Mr. Hale?

A. I think Mr. Hale. As to whether I served any notice of any application in that matter upon Charles R. Miller, I have no recollection whether I did or did not. I don't know whether I served any papers upon Charles R. Miller in connection with this suit between the time of the settling of the decree, and the attempted service upon Major Miller, as attorney for Ogilvie, in December, 1912.

I served papers on Mr. Miller and Mr. Miller's office since December, 1908, and up to the time Mr. Sieber became connected with the case, but what particular papers, and when I served them, I have no recollection at this time.

I first began serving papers on Mr. Sieber as counsel for Saalfield after he appeared in the case. It may have been in September, 1912, I don't remember the date.

Mr. CALFEE: That is all.

85 And further to maintain the issues on the part of the defendant, George W. Ogilvie, the attorneys for said defendant called WILLIAM B. HALE as a witness, who, being first duly sworn, testified as follows:

Direct examination by Mr. CALFEE:

My name is William B. Hale. I filed, as counsel for the G. & C. Merriam Company certain papers in the Circuit Court of Appeals by which I sought to get an order nunc pro tunc to file a supplemental bill and bill of review. My recollection is that I served notice of that application upon Mr. Sieber. I did not serve any notice of that upon George F. Bean, not to my recollection. I think from the time that Mr. Sieber told me that he was conducting the case I served Mr. Sieber with everything, and not Mr. Bean, or Mr. Miller with anything. I think the application will show for itself

what the purpose was. The order entered upon the application is before this Court. My purpose in applying for it to the Circuit Court of Appeals was because I deemed it necessary. The mandate had come down from the Circuit Court of Appeals and it appeared to me my supplemental bill might in some respects be contradictory to the mandate, therefore I applied to that court as a matter of respect. On the 19th of June, 1912, I obtained from this Court leave to file a bill, nunc pro tunc, as of December 16, 1912; that is my recollection. The bill is filed. I can't recall the date. I can't tell you when I filed the supplemental bill. I have a certified copy of it in my book that I can get for you (referring to book lying on table). I can't answer as to dates, I can only answer what
86 I did. I will tell you what I did from the record. The supplemental bill was filed December 16, 1912. After I obtained an order, nunc pro tunc, in this court I did not re-file the supplemental bill.

Mr. CALFEE: That is all.

And further to maintain the issues on the part of the defendant George W. Ogilvie, the attorneys for said defendant re-called GEORGE F. BEAN, who testified as follows:

Direct examination by Mr. CALFEE:

No notice of any kind was ever given me as attorney for George W. Ogilvie, of any application in the Circuit Court of Appeals, for leave to file any supplemental bill. I never heard of it until today here.

Mr. CALFEE: We rest.

Mr. HALE: I want to read the deposition of Arthur J. Saalfield, given before the Master.

Q. "Did the arrangement between you and Mr. Ogilvie contain any provisions by which Mr. Ogilvie was indemnified against liability arising from the sale of these books under the name and title which they bore when you acquired them?

A. "It is my recollection that there was no absolute indemnity, but in the event that there should be a decree rendered in these matters, that he would defend any litigation, or something
87 to that effect. The contract will show when produced."

Q. "What did Mr. Ogilvie do under this provision of the contract, with reference to defending this suit?"

A. "He defended it up to the hearing in the Court of Appeals. From that time he has made no further defense in the matter, claiming that I had violated the decree, and that he was not bound to do so."

Q. "What did you do, if anything, with regard to the defense of this suit, prior to the decision on appeal in the Circuit Court of Appeals for the Sixth Circuit at Cincinnati?"

A. "Prior to that, nothing. Not anything.

Q. "Who retained the solicitor, or counsel, who appeared in your name, and appeared in this suit?"

A. "Mr. Ogilvie."
Q. "Who paid them, if you know?
A. "Mr. Ogilvie."
Q. "Did you pay any part of the expenses prior to the decision on appeal?"
A. "I did not."

Mr. HALE: I offer in evidence the contract between Mr. Saalfield and Ogilvie, which has been referred to in these letters.

The COURT: It may be received (Exhibit I).

Mr. HALE: I also wish to offer in evidence the affidavit of George W. Ogilvie, filed in this case February 22, 1913, in opposition to the motion for a preliminary injunction made upon the supplemental bill (Exhibit J).

Mr. CALFEE: We offer the supplemental bill filed Decem-
88 ber 16, 1912.

The foregoing, with the exhibits attached, was all the evidence offered by either party and received, on the trial of said cause.

89 PLAINTIFF'S EXHIBIT A.

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

G. & C. MERRIAM COMPANY, Plaintiff,
vs.
ARTHUR J. SAALFIELD, Defendant.

Mr. B. C. Miller, Clerk:

Please withdraw the entry of appearance by Weed, Miller and Nason as counsel for Arthur J. Saalfield, heretofore filed in the above entitled cause.

WEED, MILLER AND NASON,
By CHAS. R. MILLER.

Cleveland, Ohio, Jan. 25, 1913.

PLAINTIFF'S EXHIBIT B.

(Read in evidence, ante, p. 75.)

DEFENDANTS' EXHIBIT 1.

Sep. 3, 1912.

Mr. Geo. F. Bean, Weld Bldg., Boston, Mass.

MY DEAR MR. BEAN: I find on inquiry this morning that Judge Day has returned unexpectedly and will be here on next Monday. I have had a talk with Mr. Ford and he has stated that whatever arrangements were made to put over the date of the hearing would have to be arranged between you and the eastern people.

I have had no vacation this summer excepting a few days last week and have made all my arrangements to leave Sunday next for Atlantic City for a week. I will not be here on the day set for hearing, the 9th of September, but Mr. Weed, and other members of our firm will be here and afford you every assistance they can.

Yours very truly,

(Signed) CHARLES R. MILLER.

(C. R. M./B.)

90 DEFENDANTS' EXHIBIT 2.

Dec. 11, 1912.

A. J. Saalfield, Esq., Akron, Ohio.

DEAR SIR: In a letter which I recently received from Mr. Ogilvie he told me he had learned that you and the Merriam Company had agreed upon a settlement of the pending litigation which of course means that there will be nothing further to be done in the matter, except so far as Mr. Sieber may supervise the drafting of the papers between the parties and the securing of the proper entry in Court.

I am therefore sending you a bill for my retainer and services to which I will be glad to have you give your early attention.

Mr. Sieber wrote me a few weeks ago that you were negotiating with the Merriam Company and that you had come so near an agreement that a settlement was altogether likely. I have therefore been expecting to hear that the case is ended so far as you are concerned.

I appreciate from my conversation with you that you were inclined to make a settlement if it were possible, but I had a notion that the Merriam Company would be so excessive in their demands that you could not settle.

As you what to be free to prosecute your business and not to be bothered with litigations, I congratulate you that you have apparently got this matter off your hands and mind. I presume that the settlement does not involve any change whatever in the decision of the Court as it was finally reached in Cincinnati. You certainly ought to concede nothing to the Merriam Company on that score, as both the decision of the Court of Appeals there were in my opinion on a wrong basis and gave the Merriam Company's contention much more consideration than they were entitled to.

I am hopeful that the decision in New York in the suit of the Syndicate Publishing Co. will give the Merriam Company no comfort, but rather reverse a good deal of what the other courts have said and done.

I would be glad to know, not for publication but for my own satisfaction (unless the matter is a secret) how you settled with the Merriams.

Very truly yours.

G. F. B./R. ——.

91 DEFENDANTS' EXHIBIT 3.

(Read in evidence.)

DEFENDANTS' EXHIBIT 4.

A. J. Saalfield Company, Akron, Ohio, to George F. Bean, Dr.:
1912.
Aug. and Sept.

Correspondence with you regarding further proceedings in suit of G. & C. Merriam Co. and especially with reference to the decision of the Court of Appeals on the question of an accounting, the settlement of the decree based upon that decision and what your course should be in the matter.

Sunday conferences with you and Mr. Sieber by appointment at your hotel in Boston when I was instructed to prepare form of decree and attend hearing at Cleveland.

Later conference with you alone at the Parker House after Mr. Sieber's departure.

Drafting form of decree to be presented to the Court at Cleveland and sending copies thereof to Mr. Sieber at Akron; also preparation of brief to accompany the decree, additional suggestions and information to Mr. Sieber, following your decision not to have me go to Cleveland, but that Mr. Sieber should be present at the hearing. Subsequent additions to and revision of brief to put it in final form ..... $150.

Sundry expenses, including two telegrams to Mr. Sieber and telegrams to and from the Clerk of Court at Cleveland.. 3.69

Bill of Clerk of Court at Cleveland for copy of decree and finally settled by Judge Day and sent to me by Mr. Sieber's order ..... 2.30

$155.99

Received payment.

92 PLAINTIFF'S EXHIBIT C.

NEW YORK, Dec. 20, 1912.

DEAR MR. BEAN: I have yours of the 19th inst. It is a new proposition to me that G. & C. Merriam Co. can sue me in a District in which I do not live. You certainly will accept no service in my behalf, as neither you nor Mr. Miller are representing me in any matter. The services of Miller were dispensed with by you a couple of years ago in Mr. Saalfield's case and your services in my behalf ceased when the final Boston case decision was rendered. You represented A. H. Saalfield trading as the S. P. Co. but Geo. W. Ogilvie was not in the Cleveland or Cincinnati cases. You have no authority to accept service for me and I do not give you any such authority.

If G. & C. M. Co. want to sue me they must come where I am, and not drag me in as a defendant in a case where they think they can subject me to annoyance of expense.

I certainly do not intend to defend any suit in Cleveland and if any affidavits have been made by or in behalf of G. & C. M. Co. that are not true somebody may go to the place provided for perjurers. I refer to Hale and his satellites.

Yours truly,

(Signed) GEO. W. OGILVIE.

PLAINTIFF'S EXHIBIT D.

Jan. 21, 1913.

George W. Ogilvie, Esq., The Waldorf Astoria, New York, N. Y.

DEAR MR. OGILVIE: Mr. Hale is still busy in the Cleveland case, I received yesterday from Mr. Miller a notice of the motion with accompanying documents and from Mr. Hale by registered letter this morning another copy of the same paper. I am enclosing the copy which came from Mr. Hale. I suppose that these papers are served upon Mr. Miller and myself on some theory that service upon us is sufficient to bring you into the jurisdiction of the court for such action as the court may take. I cannot possibly see how this is so. It apparently can be based on nothing else than Saalfield's testimony, which you will read in the paper I am sending you, and the copy of the contract also appended. If I were arguing the case before the court, I think I should sum up my argument in the three words, "what of it?" Supposing you had been and were financing and paying for all of Saalfield's litigation regarding these dictionaries, I fail to see how that furnishes the slightest basis for making you a defendant and I still further fail to see how, even if the Merriam Company have some cause of action against you, that can make you a party to the pending suit in Cleveland, either by serving subpœna and notices upon you personally in New York (which I think they have not done) or by serving the same
93 documents upon Mr. Miller and myself who, so far as the record shows in the suit there, have never been your attorneys.

I have never seen before now and read over the contract between you and the Saalfield Publishing Company. The only paragraph in it apparently which defines your obligations in connection with the defense of litigation is the last paragraph on page 9 of the copy sent herewith. In that paragraph you agree to pay the expense of any suit started against the Saalfield Publishing Company by the Merriam Company "for other reasons in connection with these dictionaries." That is, for other reasons than for failure on the part of the Saalfield Publishing Co. "to fully and fairly comply with all the conditions contained in the injunction" secured against Ogilvie by the Merriam Co. in the United States Circuit Court of the First Judicial District." Whether any particular suit is one which you or Saalfield is to pay the expenses of defending is none of the business of the Merriam Company, but is a question to be decided be-

tween you, amicably or otherwise. If the suit is for other reasons than a failure to fairly comply with the decree in this circuit, then it would seem that under your contract with Saalfield you agree to defend it. If the suit amounts to a claim that he has violated that decree, then it is for him to defend it.

I don't know what view the Court is going to take of this matter, but I suppose it will not fail to observe what sort of service has been attempted upon you. If an injunction against you pendente lite is granted as prayed for, it apparently would enjoin you against doing what you are not doing. If the Court should on motion enter an order that the bill be taken pro confesso as against you or enter any decree against you, it would seem that the validity of the proceedings can hereafter be raised on the score of no proper service upon you.

A "Special appearance" could be entered for you, and these questions raised now without constituting any admission on your part or submission to the court's jurisdiction, but this you do not care to do, you can for the present "stand pat" and when you get tired of standing you can "sit tight."

The opinion of Judge Hand in the Syndicate case is pleasant reading for you, I am sure, as it has been for me. The Judge decided the case not at all on precedent so far as he decided anything, but rather on the score of common sense.

Very truly yours.

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PLAINTIFF'S EXHIBIT E.

NEW YORK, Jan'y 22, 1913.

DEAR MR. BEAN: Yours at hand. Thanks for the information and copy of bill. If the M. Co. would keep their nose in their own business it would be a decided gain to the entire community. The reason they don't probably is, it smells so bad they can't stand it, so have to poke it in the affairs of others. Had they spent as much time trying to find out if the small dictionaries published by Saalfield are or are not Webster's they could have ascertained
94 what I have—viz:—of 5,089 words compared by me with the 1847 Webster 3,489 are in the same language or words, as used by Webster—751 are new words and properly in a new Webster, 343 are defined different than in 1847 Webster, but Webster himself gives credit to the sources from which he took those definitions so they never were "Webster" even in his own book, while 506 are defined differently than Webster defined them as was made necessary because of modern inventions, discoveries and meanings. So we have 3,489 and 751 and 343 equal 4,583 in all properly and legally Webster, as the court defined "Webster" and 506 just as much Webster as any new word is if definition is changed by Merriam Co., but say, for argument's sake it is not "Webster" and you still have 4,583 or 90% Webster legally and 506 or 10% in question, whereas according to their bill it is a pure confidence game that has been worked on the public by Saalfield, and myself earlier.

I refuse to go into Court in Cleveland, won't do it. S. can fight out his own contracted charities. I won't do it for him.

Yes, Hand's decision makes a good reading for me. M. Co. are appealing however, and God only knows what some other Court is going to do.

Sincerely yours,

(Signed) G. W. OGILVIE.

PLAINTIFF'S EXHIBIT F.

Jan. 24, 1913.

George W. Ogilvie, Esq., Walford-Astoria, New York, N. Y.

DEAR MR. OGILVIE: I wrote Mr. Sieber the other day with reference to Hale's notice of motion for injunction and indicated to him that no attention would be paid to the matter by me or by you. In reply he says that he has sent a copy of the notice and exhibits to you so that you must have two copies now and that he has asked you for an affidavit, showing the results of your investigation about the source of the small dictionaries.

He says he would like a copy of the record in the Syndicate case. I have only a part of the record. Do you care to accommodate him by getting a copy of it and sending it to him, provided you can secure a copy.

In his letter he says:

"I think the supplemental bill should be dismissed as against Saalfield and his company for the reason that there can be no unfair competition since the injunction regulates the use of the title "Webster" on all the dictionaries, including the small ones and as long as the injunction is complied with the publications will show on their face that they are not being sold either by Saalfield or his company as the books of the complainant."

I wrote you about this matter because I try to let you know of anything of any possible interest which may come to my attention.

With kindest regards.

Very truly yours,

G. F. B./R.

95 PLAINTIFF'S EXHIBIT G.

NEW YORK, Dec. 25, 1912.

MY DEAR MR. BEAN: Many thanks for yours of the 24th inst. I agree with you as to the lack of necessity for Saalfield having given up the copy of our contract and as to his and Sieber's having been "easy marks," without a doubt.

They certainly did not have to give up the contract at that time if ever. As Hale tried to drag me in (if I understand it) before he got the contract it is just one of his "try it on and you may get away

with it" tricks. I shall not defend the suit in any way. Saalfield contracted with G. & C. M. Co. permitting them to file a supplemental bill to test the right to call the smaller books Webster. Having don[illegible] it is, as I wrote to him, his charity, not mine, and having l[illegible] so charitable he can take care of his own charities.

I have nothing to do with the accounting as that is specifically A. J. Saalfield's or the S. P. Co.'s. I have no property within the Cleveland Circuit and they cannot attach anything, and so get service. Hale simply cannot reach me out there—nor here for I am not doing anything nor have I done anything since Boston decree, except accept royalties and if that is a crime I hope I may become an arch criminal. I am glad you did not accept service. Of course I did not think you would, but one can't always be sure of the workings of another's mind when no consultation over the matter has been had.

As to procuring the supplemental bill I shall make no move. I simply am not going to put myself in position to have any court say "You accepted the matter because of your actions." I am not going to act at all. I would read a copy of it as a matter of curiosity, perhaps, but am not sure I'd do even that much.

Hale is up against it if he thinks he can get Webster off of Abridgments. The fact that some one of England published a book taken almost bodily from Webster and we used it as a catalogue of words as a guide to the size of our book does not make anything but a Webster of its contents. I have made a digest and find that of 1038 words defined 718 are unquestionably copied from the 1847 Edn. of Webster, 195 are new words, 64 are from sources other than Webster, and 61 while in 1847 are definitions that he took from and gave credit to other sources. If we have a right to credit Webster and add new words, we also have a right to credit Webster with the last 61 as M. Co. claim 47 Edn. "Genuine." Then add the 718-195 and 61 and we have 964 words out of 1038 or about 95% Webster legally if not actually. So where will Hale get off? You remember I testified that about 50% of Imperial was new and the courts said it was Webster.

When Hale gets to Hell with a big H, I can see the Old Nick feeding him the rather unsubstantial food of words.

If anything new comes up let me know and I'll do the same for you. S. paid them $1,000 cash and $1,000 every six mos. for 2½ years, a total of $6,000 for peace and was goldbricked.

Yours truly,

(Signed) G. W. OGILVIE.

96 PLAINTIFF'S EXHIBIT H.

NEW YORK, Sept. 8, 1913.

Geo. F. Bean, Esq., Boston, Mass.

DEAR MR. BEAN: I wrote some time ago asking you to forward me an affidavit reciting the fact that subsequent to the date upon which the C. C. of A. in Cincinnati gave G. & C. M. Co. an accounting you did not represent Saalfield, Ogilvie or anyone else in the

litigation between G. & C. M. Co. and Saalfield. I have not heard from you since then and am wondering if my letter ever reached you or if it did if your reply didn't go astray. I may require what I have asked for suddenly and want to have it on hand, so please send it along to me.

Of course you understand that I wish to use it, if at all, in offsetting the action of the Cleveland Court in holding me subject to its jurisdiction. I have just received a wire from Saalfield saying that Judge Day (in Cleveland) ordered him to produce his books tomorrow (Sept. 9) in Cleveland "showing payments made to you (me)." So I guess I must be prepared to fight that crowd all over again.

Yours sincerely,
(Signed) G. W. OGILVIE.

DEFENDANTS' EXHIBIT 5.

NEW YORK, Mar. 4, 1911.

DEAR MR. BEAN: I've read your brief so far, very good, and as usual it will end the argument satisfactorily I am sure.

I enclose a few comments. Why the M. Co. retain J. & H. and fight so hard I can't figure out on any reasonable basis, except that some persons don't know when they're "licked."

I am glad to know that Mrs. Bean is comfortable and I hope for the best results from the treatment she is having, but, as you say, you have "no assurance." Give her my kindest regards in which Mrs. Ogilvie joins.

Yours sincerely,
(Signed) G. W. OGILVIE.

Two years of Taft, today—not 6 more, I'll bet a hat only two.

G. W. O.

I hope you can enlarge some on the interference annoyance, expense and loss of trade (which the Boston Court said was unlawfully caused) occasioned by the G. & C. M. Co.'s tactics and belligerency. The fight would have "busted" some people and it has strained me.

G. W. O.

97 DEFENDANTS' EXHIBIT 6.

Aug. 29, 1912.

A. J. Saalfield, Esq., Akron, Ohio.

MY DEAR MR. SAALFIELD: I have just received yours of Aug. 27. I regret that there is any difference of opinion between you and Mr. Ogilvie as to whose duty it is to take care of the Merriam suit from this time on and I trust that ultimately such difference of opinion may be overcome.

I note that you expect to be in Boston next Monday which is Labor Day. I do not expect to be in my office all day that day but

shall be glad to meet you at any time or place you may designate and I am getting this letter off immediately so that you will be able to wire me whether you will certainly be here Monday and, if so, at what hour. If you wire me that you will be here then, please indicate at what hotel you will stop as well as the hour when you would like to see me. I live ten moles outside the city, but will be on hand according as you may telegraph.

My house telephone is Woburn 74-1 and you can reach me there upon your arrival in Boston if you get here early in the morning and the hour of our conference can thus be arranged.

You ask me to send you a copy of the Record. As I am to see you, I will not undertake to send you anything now. The "Record" is comprised in a quite large volume. The two opinions of the Court of Appeals indicate quite clearly wherein it has been found that you have either invaded the Merriam Company's rights or to what extent it is held that the latter are entitled to an accounting if it should be found they are entitled to anything. It is not yet definitely established that they must be paid any part of your profits. The last opinion of the Court undertakes to particularly indicate under what circumstances they are entitled to your profits. The task of going into the matter in the way the Court has indicated will inevitably be long and complicated, one which involves not merely ascertaining what dictionaries you have sold and the profits on such sales, but to what extent, if at all, it can be shown that purchasers from you have been deceived, etc. Upon going over the opinion of the Court you will quickly observe that the matter bids fair to be very complicated.

The mandate of the Court of Appeals will in due course reach the District Court at Cleveland on or about September 5. Mr. Hale, the counsel for the Merriam Co. has notified me that he expects to have the settlement of the decree based on the mandate come up in the Court at Cleveland on Monday, September 9. He has drafted a form of decree which must be opposed as embracing very much which, in my opinion, does not belong there. I have also drafted a form of decree which I think conforms to the opinion of the Court.

I shall either have to be in Cleveland when the question of the form of decree is settled or I shall have to file with the Court there the form which I think is right and accompany it by a statement of my reasons for submitting the decree as well as a statement of my reasons for objecting to Hale's form. The latter method is not a very safe one to pursue because in that way it is impossible to anticipate what Hale may say in advocating has form and therefore impossible to effectually meet*ing* his argument.

98 It is very desirable that I should have a conference with you at this time, and I am glad you expect to be here Monday. If it should happen you do not get here that day, I trust you will be able to come the next day so that what I am to do will be fully outlined and understood between us.

Very truly yours,

G. F. B./R.

COPY BOUND CLOSE

DEFENDANTS' EXHIBIT 7.

Letter of Aug. 29, 1912, to Charles R. Miller, Esq., by Mr. Bean, read in evidence, pp. —.

DEFENDANTS' EXHIBIT 8.

NEW YORK, Oct. 7, 1912.

DEAR MR. BEAN: Here's a sample of how the G. & C. M. are "not in any manner" claiming the Webster right—in spite of the injunction. How much will you see through a contempt proceeding for and I'll try to get it paid for by all of the afflicted. You have had some experience and know that publishers, — speaking "give up" hard so consider that in naming your figure. Personally I'm out of it, but am willing to go after them if I can get others to spend the cash necessary to do it.

Walter is progressing finely—is out of the hospital and recovery is only a matter of time.

Kindest regards to Mrs. Bean who I hope continues to get on nicely.

Yours truly,

(Signed) G. W. OGILVIE.

No news from Akron. Not a word. — G. W. O. Chicago Tribune circulation is 225,000.

DEFENDANTS' EXHIBIT 9.

December 17, 1912.

George W. Ogilvie, Esq., Waldorf-Astoria, New York, N. Y.

DEAR MR. OGILVIE: I wrote Mr. Sieber the other day that I understood Saalfield and the Merriam Co. had settled and he has sent me the enclosed letter. I have thought that you might like to read it and am therefore enclosing it. Possibly you already know the substance of the settlement reached. Please return the letter at your convenience.

From what Mr. Sieber writes, I conclude it is possible, or perhaps probable, that Mr. Hale is going to indulge in some more litigation regarding the smaller dictionaries.

I know nothing about the parties whom I understand Hale has sued. Mr. Payne wrote me that he understood there were ten suits altogether pending and asked me if I could tell who the defendants are. As I could not, I wrote you about the matter, thinking you might know. I imagine Hale will not bring any more suits or press those which he has brought until he gets a decision in the Syndicate Company's case and let us hope that that de-

99

cision will be such that he will not want to go any further. I trust your anticipations regarding the outcome of that case will be justified by the result.

Answering your kind inquiry, Mrs. Bean's general health is very good now and there seems to be no noticeable difference in her condition from that which has prevailed for some time.

With kindest regards to Mr. Deal Mrs. Ogilvie and yourself, I am

Very truly yours,

——— ———.

G. F. B./R.

(Enc.)

DEFENDANTS' EXHIBIT 10.

Letter from Mr. Bean to Mr. Charles R. Miller, dated December 26, read in evidence, pp. —.

DEFENDANTS' EXHIBIT 11.

CLEVELAND, Dec. 31, 1912.

Mr. Geo. F. Bean, Weld Bldg., Boston Mass.

MY DEAR MR. BEAN: In reply to your favor of the 26th inst. I have to advise you that the only appearance which we entered in the case of Merriam v. Saalfield was for the defendant Saalfield. You never entered any appearance in the case, therefore, I am at a loss to see how any service of any character could be had upon Mr. Ogilvie by serving summons upon either of us. The supplemental bill, however, makes Saalfield Publishing Co. party defendant, and the recitals in the affidavit filed by Mr. Hale *is* to the effect that Saalfield never defended the case, but that the defense was made by Mr. Ogilvie, and all the bills including the attorney's fees *was* paid by him.

Yours very truly,
(Signed) CHAS. R. MILLER.

C. R. M./B.

100 DEFENDANTS' EXHIBIT 12.

Jan. 4, 1913.

George W. Ogilvie, Esq., Waldorf-Astoria, New York, N. Y.

DEAR MR. OGILVIE: I am delighted to hear from you of the decision in the Syndicate case. I have felt it from the first that Hale could not win that case unless the Courts were going to establish a new principle regarding the name "Webster", new both as to the chain of Webster's Dictionary cases and also as to the general propo-

s-tion of the right of the public to the use of literary matter and titles after the expiration of copyright.

I do not quite agree with you that we did not have enough evidence to the effect that the word had no secondary meaning. I think there was enough of such evidence and I know that it was urged upon Judge Colt that the word did not have a secondary meaning. It is true we did not have all the evidence we might have had, but there was quite a lot of it, starting with your own evidence as to the fifty or more dictionaries bearing the name Webster. Judge Colt, I think, slipped up on that point, but as you know, we were so well satisfied with the rest of his decision that you had no desire to appeal.

I received the enclosed letter from Mr. Sieber yesterday which I think you will be interested to read, and which I would like to have you return at your convenience. Supposing all the averments in the petition and bill and affidavit were true, (which is an impossible supposition), yet I cannot see how the Court has any jurisdiction over you in consequence thereof.

I note that Sieber refers to his interpretation of the contract between you and Saalfield which I have not seen, but, as the decree here at the time that contract was made had no reference to any dictionary but the large one, I do not suppose you could have done any more than to agree to protect Saalfield so long as he complied with the decree then in force and, even if the smaller dictionaries were included, the agreement would only then be to protect him so long as he complied with that decree and could not be to defend him in suits which might be brought against him, asserting new claims to the name Webster and seeking a decree of altogether different import from that which had then been entered.

In my letter to Mr. Sieber I intimated that he must be surprised to find Saalfield sued forthwith after the entry of the decree which *and* (?) agreed to, inasmuch as he had written me that he interpreted the agreement between him and Hale to be that Saalfield was to be no further interfered with or disturbed so long as he conformed to the decree. You will observe that Mr. Sieber makes no reply to that suggestion and I imagine he may well be rather chagrined at the situation.

Very truly yours,

G. F. B./R.

Enc.

101 DEFENDANTS' EXHIBIT 13.

Jan. 21, 1913.

Charles R. Miller, Esq., Century Building, Cleveland, Ohio.

MY DEAR MR. MILLER: I have yours of January 28, enclosing some more papers left with you in the case of Merriam v. Saalfield and another copy of the same document has been received by me by registered mail from Mr. Hale.

I cannot for the life of me see how the Court is going to find that sufficient service has been made upon Ogilvie by leaving with you or me copies of this notice, etc. I suppose Hale bases his contention wholly upon the fact that it has appeared from evidence that a contract between Saalfield and Ogilvie provided that Ogilvie should pay any expense in connection with any suit which might be started against Saalfield by the Merriam Co. for other reasons than an alleged failure of Saalfield to comply with the decree which had been entered against Ogilvie in this circuit.

Assuming that this is so and assuming that Ogilvie bore all the expense of the litigation in your circuit up to a certain point, I fail to see how that brings him within the jurisdiction of the Court there or how service upon you or him who have never been attorneys of record for Ogilvie can be sufficient service on him, even if he could be brought into that case because of the business relations between himself and Saalfield.

As a matter of fact I am not retained by Ogilvie or by anybody else in connection with that litigation and I understand Mr. Ogilvie cares nothing about it at present and will not appear especially or otherwise in the matter at all. It will be up to the Court, therefore, to take notice of the method of service attempted and to decide whether on motion any injunction can be issued against Ogilvie or the bill can be taken pro confesso as against him or any decree entered against him.

I am much obliged to you for sending me the paper and I trust neither you nor I will be further annoyed in the matter.

Very truly yours,

G.F.B./R.

102 DEFENDANT'S EXHIBIT 14.

BOSTON, Sept. 10, 1913.

B. C. Miller, Esq., 330 Federal Building, Cleveland Ohio.

DEAR SIR: I understand that a hearing is to be had or is being held before you as master in connection with a "Supplemental Bill" of G. & C. Merriam Co. vs. Arthur J. Saalfield. This supplemental bill I suppose to be supplemental to an original bill filed by the Merriam Company against Saalfield in the District Court for the Northern District of Ohio in which case I appeared for the defendant Saalfield, representing him both in the District Court and subsequently in the Circuit Court of Appeals.

I remember that sometime ago I received a notice addressed to me as Attorney for George W. Ogilvie and referring to such hearing before you. I have no idea why, or upon what representation an order was made for such service upon me, if in fact there was an order, as I have never been attorney for said Ogilvie in said suit between the Merriam Company and Saalfield in the Sixth Circuit. I was attorney of record for said Saalfield in that litigation from its beginning until its conclusion in June or July 1912, but Mr.

Ogilvie was not a party to it in any way, Saalfield was the only defendant and I represented him.

Immediately following the decision of the Circuit Court of Appeals in July, 1912, which directed an accounting on the part of said Saalfield, my employment by him as his attorney in the case terminated, and, as I understand, he employed his local counsel, Hon. George W. Sieber, to represent him in connection with any further proceedings in the case.

I formerly represented Mr. Ogilvie in litigation between the Merriam Company and him in the First Circuit and that litigation was terminated in 1909.

I am writing this letter to say that notice of the hearing before you served upon me as attorney for Ogilvie has received no attention from me because I am not and never have been his attorney of record in the litigation in the Sixth Circuit and he was not a party to that litigation.

I thought it best that you should know this fact and that notice on me was not notice on Ogilvie, nor has he received any notice through me of the proceedings in connection with the above named supplemental bill and you should govern yourself accordingly.

Very truly yours,

(Signed) GEORGE F. BEAN.

G.F.B./R.

## Plaintiff's Exhibit I.

Contract Between Saalfield and Ogilvie, Referred to in Foregoing Testimony; Ante, p. —.

103 The within statement of evidence has been duly presented to me. I have examined the same and find the statement to be true, complete and properly prepared, and accordingly approve the same in conformity to the requirements of sub-section "B" of Rule 75 of the Equity Rules promulgated by the Supreme Court of the United States.

JOHN M. KILLITS, *Judge*.

Toledo, Ohio, June 9, 1914.

104 (*Affidavit, Filed February* 22, 1913.)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 7683. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a CORPORATION, AND GEORGE W. OGILVIE, Defendants.

Affidavit.

STATE OF NEW YORK,
*City and County of New York*, ss:

George W. Ogilvie, being duly sworn, deposes and says:

That at the special request of the defendants, Arthur J. Saalfield and the Saalfield Publishing Company, and as an expert solely and not as one of the defendants herein, deponent has prepared the following affidavit for the defendants, Saalfield and Saalfield Publishing Company, in the above-entitled-action, to be used by them in the hearing upon the motion filed in this action by the complainant, wherein an injunction pendente lite is sought. This affidavit is presented by deponent in the capacity of an expert and not as one of the defendants herein, as he does not in any way appear herein nor is this affidavit to be in any manner whatsoever construed as an appearance herein, but is made solely for the purpose of presenting to the Court as an expert such matters as are hereinafter contained, and for no other purpose whatsoever.

That he is upwards of fifty years of age and has been engaged in the business of publishing, editing, compiling, collating and
105 assembling books of reference of various kinds and descriptions and directing the work of other editors in so doing for a period of upwards of twenty-eight years. A few of the many works so published or compiled by deponent and upon which he, in a measure, bases his qualifications herein as an expect, are the following:

"Gaskell's Hand Book of Useful Information."
"Ogilvie's Encyclopedia."
"The American Special Encyclopedia."
"Edison's Encyclopedia."
"Webster's Encyclopedia."

And among other books compiled or edited solely by him under the nom-de-plume of George W. Conklin are:

"Conklin's Argument Settler."
"Conklin's Writing Desk Book."
"Conklin's Handy Manual of Useful Information."
"Conklin's Synonyms and Antonyms."

"Conklin's Familiar Quotations."
"Conklin's Who Said That."
"Conklin's Who Wrote That?"
"Conklin's Shakesperean Manual."

and various other works of reference of which there have been sold, to the best of deponent's knowledge and belief, a total of upwards of five million of copies, and one of which, "Conklin's Handy Manual" over three millions of copies have been sold.

That in addition to the foregoing works of reference, deponent has published and had edited, under his personal supervision and direction, the following dictionaries of the English language,
106 to-wit:

"American Encyclopedic Dictionary" (a work published in four volumes and consisting of over 5,000 pages.)

"Webster's Imperial Dictionary" (a revision and amplification of the "1847 Webster's Unabridged Dictionary."

"Webster's Inter-Collegiate Dictionary."

"Webster's Adequate Dictionary" (which is also published under the name of "Webster's Reliable Dictionary."

"Webster's Sterling Dictionary."

All the foregoing dictionaries were duly copyrighted and the copyrights thereon are still alive.

This affidavit is made by deponent expressly to show the Court that the "Inter-Collegiate", "Adequate" and "Sterling" dictionaries, concerning which this litigation has been instituted, are in reality "Webster" dictionaries and not a "Chambers" dictionary, as is alleged.

That deponent has read and analyzed the affidavit of one C. O. Sylvester Mawson, filed in this action by complainant as its expert and has carefully considered and compared the data therein set forth and the statements therein alleged as facts and, for the purpose of the convenience of the Court, deponent will reply to the allegations therein set forth in the same order as that in which they appear.

Deponent admits that the dictionary entitled "Chambers' Twentieth Century Dictionary" was published in England by W. R. Chambers, Limited, but asserts that the name "Chambers" was doubtless given to it to distinguish its publishers and not its editors or in any way to indicate that "Chambers" did any editorial work on the dictionary itself — any more than "Collier" edits "Colliers Weekly", or "Harper" edits "Harper's Bazaar" or "Schibner" edits "Scribner's Monthly" or that Leslie edits "Leslie's Weegly" — he having been dead for years, for, as a matter of fact, as is hereinafter shown,
"Chambers" is not an original work, but only a revision and
107 abridgement of much of the matter contained in the "1847 Edition of Noah Webster's Dictionary" itself or of some dictionary based on or copied from that work.

The said Mawson, as appears from the statements contained in his affidavit and set forth in paragraph numbered 1, alleged that "Webster's Sterling Dictionary" is merely a photographic re-print of "Webster's Adequate Dictionary" and "that the literary contents remain precisely the same," which alleged fact deponent states if

very far from a "Fact." That deponent is thoroughly familiar and well qualified to acquaint the Court with the distinction and difference between the said "Inter-collegiate" and the "Adequate" and "Sterling" dictionaries, which two latter books Mawson swears in paragraph 1 are "precisely the same." The true facts are as follows:

"Webster's Inter-Collegiate Dictionary" contains over 1,200 pages. "Webster's Adequate Dictionary" contains 721 pages of the same size type and page as the "Inter-collegiate," while "Webster's Sterling Dictionary" consists of only 567 pages—a difference of about 500 pages between the "Inter-collegiate" and "Adequate," 650 pages between the "Inter-collegiate" and "Sterling" and 150 pages between the "Adequate" and "Sterling," whereas Mawson swears that they are "Identical with each other."

The allegations, as set forth in the first three lines of paragraph 2 of Mawson's affidavit are very misleading as is proven by the foregoing statement of dictionary pages and contents, but those set forth in the last 13 lines of said paragraph are absolutely true. "Webster's Adequate Dictionary" was abridged, in the manner described by the said Mawson, as a matter of economy and for commercial purposes, the abridged work being one intended for and
108 actually sold to, customers whose requirements were met by a more abbreviated dictionary than "Webster's Inter-collegiate," but deponent is unable to discover what difference it makes whether one mechanical method was adopted by him in reference to the typesetting of "Webster's Inter-collegiate Dictionary" and abridging it so that "Webster's Adequate Dictionary" could be produced therefrom without going to the expense of setting the type again, or whether some other method was used and is, therefore, somewhat put to it to properly reply, but knows the truth of the matter to be that deponent devised at that time what he believes to be a means of abridging which had never before been attempted and Mawson's lengthy paragraph of objection to the new plan devised is merely an exhibition of his ignorance of all up-to-date or ingenious ways of economical operation. The mechanical method adopted in producing any book has nothing whatever to do, as Mawson and the Court both well know, with the question as to the origin of the literary matter contained within its cover and deponent, after searching the recesses of his brain for any reason that could be considered logical and reasonable, believes that practically all of paragraph 3 of said Mawson's affidavit, and certainly the last 13 lines thereof, is included therein for the purpose of attempting to throw dust in the eyes of the Court, hoping almost against hope that it would be unfamiliar with the technical mechanical method of producing books and so raise a question in the mind of the Judge that, in some unexplained and to me incomprehensible manner, might redound to the benefit of his employer, the complainant.

To further emphasize that which would seem to be the deliberate inaccuracy of many of the statements contained in said Maw-
109 son's affidavit, deponent calls the attention of the Court to the fact that the "Inter-collegiate Dictionary" contains over 1,200 pages, the "Adequate Dictionary" contains 721 pages and the

"Sterling Dictionary" contains only 567 pages notwithstanding which incontrovertible facts Mawson swears, in paragraph 3 of his affidavit, that all three dictionaries are "substantially the same identical book in dictionary contents."

Deponent here states that, after ascertaining by comparison that the so called "Chambers Twentieth Century Dictionary" was, in reality, a "Webster," falsely called "Chambers" by its English publishers, it was used just as numerous other dictionaries and innumerable works of reference were used and referred to by the editor of the said "Inter-collegiate Dictionary" as a catalog of words, and for such other purposes as to him seemed fit, suitable and proper, because it (Chambers) actually was an abridged work of the original "Noah Webster Dictionary," as is more fully hereinafter set forth, and more particularly because it was a work approximating in size and extent the one that it was desired to produce under the name "Webster's Inter-collegiate Dictionary."

It must be apparent to any casual observer and the Court in particular that, it is a most difficult matter to judge, even approximately, how many pages an abridgement of an unabridged dictionary, such as "Webster's Imperial Dictionary" will make, unless some guide is secured that will aid in arriving at a conclusion, and it was principally for that purpose and in that connection that the falsely so called "Chambers Dictionary" was used by deponent's editor as a guide.

The crux of this litigation, stripped of all its verbiage, seems to deponent to be simply whether the defendants Saalfield
110 and Saalfield Publishing Company, are misrepresenting to the public that the "Inter-collegiate," "Adequate," and "Sterling" dictionaries are "Webster's" dictionaries or whether they are not. All genuine "Webster" dictionaries of today have for their base or foundation the "Noah Webster Dictionary of 1847" which was, in turn, founded or based (for they are synonomous words) upon preceding "Webster" dictionaries and, consequently, to be a "Webster" dictionary it should contain a sufficient amount of "Webster" matter,—that is to say, enough of Websters' own work, in the form of definitions taken, in toto or abridged, from the "1847 Edition" to justify the use *if* the name "Webster" in connection with any new abridgements, amplifications or enlargements of that work.

At folio 7, paragraph 3, Mr. Mawson states that the "Inter-collegiate," "Adequate" and "Sterling" dictionaries have upon their title pages the following statement—"based on 'Webster's Imperial' and 'Webster's Universal' dictionaries" and claims that that statement is "untrue." To show that Mawson's statement as to its being "untrue" is itself false, the Court is referred to the scientific definitions of the word "ray" on pages 382 and 383 of "Websters' Adequate" or "Reliable Dictionary," which definition also appears in the same form and words in all three of the dictionaries "Inter-collegiate," "Adequate" and "Sterling." Upon comparison with the definition of the same word in "Websters' Imperial Dictionary" and "Webster's Universal Dictionary" (both of which are now

published by the defendant, "Saalfield Publishing Co.) it will be found that the definition and illustration accompanying it in all five of the books is identical. The same would be true of hundreds of other and more brief definitions, but as this occupies so much space, a comparison will be more easily effected and it is
111 referred to to prove that these books are based on "Webster's Imperial" or "Webster's Universal" dictionaries, which in turn were based and founded on the "1847 Webster."

Just one more illustration of the fact that "Webster's Inter-collegiate Dictionary" is based on "Webster's Imperial Dictionary will be found in the definition of the word "hara-kari," and the Court is respectfully referred to the definition of that word on page 763 in "Webster's Imperial Dictionary" and the abridged definition of the "Imperial" definition which is to be found in "Webster's Reliable Dictionary" on page 766. The word did not appear in "Webster's 1847 Edition." The definition in "Webster's Imperial Dictionary" therefore is unquestionably the base of the definition found in the "Reliable Dictionary" and the Court, by comparison, will be able to see how different the phraseology is and yet how exactly it compares and unmistakably shows where the "Webster's Reliable Dictionary" definition of that word was taken from.

It is true, as charged by Mawson in paragraph 3 of his affidavit, that "many of the illustrations" in "Chambers" and the "Reliable" are identical," but it is my belief that none of the dictionaries edited by Noah Webster himself ever contained a single illustration, other than his portrait (if even that), and deponent is unable to discover that the addition of an illustration to more fully explain a Noah Webster definition, as has been done both by complainant and defendant, makes the definition any less genuinely "Webster," that it would be without the illustration, irrespective of where the illustration came from, and the same is true of appendix matter contained in the books published by either the complainant or the defendant, all of which bear the label "Webster," although
112 Webster himself never included an illustration and never edited the appendix matter in any of the books of either complainant or of the defendant, and deponent cannot see that this has any bearing on the question at issue—but the allegation is made and this is deponent's answer to it, as an expert.

Deponent, under whose direction the said "Webster's Imperial Dictionary" and "Webster's Universal Dictionary" were compiled and edited, states that the said dictionaries were based upon the "Noah Webster's Dictionary of 1847," which fact was expressly found in the decision of Judge Colt, in the case of Ogilvie vs. Merriam, in the United States Circuit Court, First Circuit.

Deponent, for the purpose of amplifying, here reverts to the statement he previously made to the effect that the falsely so called "Chambers' Dictionary" (falsely if "Chambers" were intended to convey the idea that it was not a "Webster"), is in itself based upon the "Noah Webster's Dictionary," because deponent personally analyzed and compared the falsely so called "Chambers," dictionary with "Webster's Imperial Dictionary" and also with the "1847

Edition of Noah Webster's Dictionary," with this result: He found an overwhelming majority of the words examined and compared in the falsely entitled "Chambers," dictionary had been taken bodily from the "Noah Webster's Dictionary," with such additions, emendations or other changes as are absolutely necessary in re-editing a complete dictionary of the English Language into an abridged edition thereof.

Deponent, at the request of the defendants, Saalfield and Saalfield Publishing Company, and within the past thirty days, made an analytical examination of the matter and words contained
113 in Webster's "Adequate" or "Reliable" dictionary (both books being the same, but published under different titles), comparing the same with "Webster's Imperial Dictionary," which is a new revision and edition of the "1847 Edition of Noah Webster's Dictionary" and with the said "1847 Edition" itself. This examination disclosed the fact that the basic source, foundation or origin of the dictionary matter contained in "Webster's Inter-collegiate," "Adequate" and "Sterling" dictionaries, (also "Webster's Reliable Dictionary") is, unqualifiedly, the "Webster's Imperial" and the "Noah" Webster's Dictionary, 1847 Edition." The analysis of deponent's examination is filed herewith in exhibit form and summarized is as follows:

Exhibit "A" is a copy of "Webster's Reliable Dictionary," with marked pages as outlined in Exhibit "B." Exhibit "B"—showing the detailed result of the examination of said "Webster's Reliable Dictionary" and discloses the fact that 5,300 vocabulary words were examined and compared—of which

3,637 were defined by the use of the same words as were found in the definitions in the "Webster's Imperial" and in the "1847 Edition of Noah Webster's Dictionary."

777 of the 5,300 words are words that have come into the language since Noah Webster compiled his "1847" dictionary and those words, therefore, did not—and could not have appeared in the "1847 Edition," but almost without exception do appear in Webster's "Imperial" and "Universal."

533 of the 5,300 compared words are words defined in the "Reliable" by the use of different words from those used by Noah Webster, but in many, if not a majority of instances, the changes made were necessary in an up-to-date dictionary, because of new inventions, discoveries, etc., which changed their meanings
114 as well as otherwise amplified meanings which many of these 533 words have acquired since the death of Noah Webster, examples of which are "ray," "merger," etc., etc.

353 of the 5,300 words are defined by the use of words different from those found in the definition in the "Noah Webster 1847 Edition," but those definitions are ones which he, himself, took from sources, other, and probably by him considered better, than his own brain, and never were Webster's original work, absolute proof of which lack of originality lies in the fact that due credit was given by him following each of those definitions in the "1847 Edition" to the source from which he took them,

A concise summary of the 5,300 words shows that 3,637 plus 777, plus 353, a total of 4,767, are justly and properly denominated "Webster's," 3,637 because of their base and 777 and 353, a total of 1,130, because various Federal Courts have determined that amplified or abridged editions of the "1847 Webster's Dictionary" are properly named "Webster's," irrespective of or by whom they are published or edited.

533 of the 5,500 words, not having original Noah Webster definitions, necessarily were changed, because the editor found that Webster's archaic, obsolete or obsolescent, selected definitions, did not meet present-day requirements, and that they, as originally written, would be wholly out of place in any dictionary purporting to be a current or reliable and up-to-date dictionary.

A summary of the foregoing is that of the 5,300 words compared, only 533 words (three more than 10% *per cent* of the total number) can be classed as anything else than Webster definitions, not-
115 withstanding which they are properly in a "Webster's," thus leaving ninety (90%) per cent of the total number just as much Webster matter as anything contained in any so-called "Webster" dictionary published today by any publisher.

Exhibits "C," "D," "E," "F," and "G" are pages taken from the "1847 Edition" of Webster's Dictionary and are marked with pencil or ink markings surrounding definitions of certain words showing them practically just as they appear in "Webster's Intercollegiate," "Adequate" and "Sterling" dictionaries, the only changes being those necessary in an abridged work.

Exhibit "F" shows, surrounded by an ink marking on a page cut from "Webster's Reliable Dictionary," the definition of the word "give" as it appears therein and attached to that page will be found a page cut from the "1847 Edition" of "Webster's Dictionary," ink-marked, showing the use of the identical words in the definition of the word "give" in Webster's Reliable Dictionary" and in exactly the same sequence as they appear in "Webster's 1847 Edition." From deponent's expert knowledge of reference book editorial work and his experience gained from having done a large amount of it, he makes the clear, definite and positive statement that without the "1847 Edition of Webster's Dictionary" before the respective editors of "Chambers' Dictionary" or "Webster's Reliable Dictionary" to copy from when definitions of those words were being written, it would have been utterly impossible for either of the editors to have used exactly the same words and in exactly the same sequence as they appear in all three of those books, the same having originally appeared as the work of Noah Webster at a period exceeding a half a century before the time that the "Chambers or "Reliable" were published.

116 Exhibit "G", wherein will be found a comparison of the definitions of the word "mild" shows the difficulty of making the marked comparison for the Court's convenience and reference because, in many instances, the words used in defining the vocabulary words in "Webster's 1847 Edition" do not appear in exactly the same sequence in the falsely so-called "Chambers'" dictionary

and in the honestly entitled "Webster's Reliable Dictionary", and deponent further states that without "Webster's 1847 Edition" before him to copy from, no editor could produce a work so exact in duplication of phrascology or show so many other points of consecutive order of shades of meaning defined and general similarity, as is shown by a comparison of these books throughout.

Illustrating the impartial manner in which deponent selected the various pages in "Webster's Reliable Dictionary" which he compared with the "1847 Edition" and also with "Webster's Imperial Dictionary", deponent states that he selected the first and last complete pages of definitions of the letters of the alphabet from "A" to "Z", inclusive, next he selected each fiftieth page in the book, beginning with page 50 and so on to the end of the book, the other pages of the whole number of 131 pages which he compared were selected at random without any definite plan, but merely by haphazard as he happened to open the book at any particular spot, believing that by the adoption of that method an absolutely fair and impartial digest of the entire book could be made.

The comparisons contained in Exhibit- "H", "I", "J" and "K" were made by deponent subsequent to the time when he read the affidavit of the said Mawson and were made by deponent with a copy of the affidavit of Mawson before him for reference.

117 Mawson therein states in paragraph 3, that he took "the first 5 pages out of every 50 pages" in said "Inter-collegiate Dictionary" and compared them with "the corresponding portions of said Chambers' Dictionary". Deponent, therefore, took from the "Inter-collegiate Dictionary" the inclusive pages 200 to 205, 300 to 305, 400 to 405 and 700 to 705, being four "fives" of the pages Mawson refers to in paragraph 3, and made the same sort of comparison with the "1847 Edition" that he made when he used "Webster's Reliable Dictionary" for comparison purposes. The result of the examination and comparison of "Webster's Inter-collegiate Dictionary" with "Webster's 1847 Edition" and "Saalfield's Webster's Imperial" dictionaries discloses the fact that practically the same percentage of genuine Webster definitions appears in the foregoing four "fives" of pages of "Webster's Inter-collegiate Dictionary" as are shown to exist in the comparison of the "1847 Edition" with "Webster's Reliable Dictionary", there being on the before-mentioned pages taken from "Webster's Inter-collegiate Dictionary" 737 vocabulary words of which 511 are copied from "Webster's 1847 Edition", 128 are new words not in the "1847 Edition", 76 differ from "Webster's 1847" definitions and 22 are definitions of words which appeared in "Webster's Dictionary" originally, but were taken by him from other sources, so that 511, plus 128, plus 22 are properly "Webster" according to various Court decisions. The foregoing digest and comparison thus shows approximately ninety (90) per cent genuine Webster matter in the "Inter-collegiate"—the same percentage as is shown by the analysis of "Webster's Reliable Dictionary", made by deponent.

The last paragraph in Mawson's affidavit refers to "synonyms"

and states that they are identical with "Fallows". The last
118 edition of "Webster", published by complainant itself, contains somebody's synonyms,—I do not know whose—nor is it material whose they are. They were not "Webster's", for Webster never compiled a book of synonyms and I am unable to discover any reason why complainant should object to others doing what they themselves have done, when the legal right to do the thing is equal and not controlled by any person. I do not know whether "Fallows' Synonyms" was used in compiling the dictionaries—it may have been—but I doubt it and, as complainant does not own the copyright thereon and never has owned it to the best of my knowledge and belief, it is therefore without the legal right to complain.

A summary of the statements made by Mawson in his affidavit is that the "Inter-collegiate", "Adequate" and "Sterling" dictionaries are not "Webster" dictionaries but are, as a matter of fact, "Chambers'" dictionaries and that, therefore, the representation made by the defendants to the effect that the said "Inter-collegiate", "Adequate", and "Sterling" dictionaries are "Webster" dictionaries is "untrue", in answer thereto deponent respectfully states that it is immaterial whether the said "Inter-collegiate", "Adequate", and "Sterling" dictionaries, little or much, correspond with "Chambers' Dictionary", because the analysis and comparison made by deponent of the said "Inter-collegiate" "Adequate" and "Sterling" dictionaries, with the original "Noah Webster's 1847 Edition" clearly demonstrates that the former dictionaries are overwhelmingly taken from the said "Noah Webster's Dictionary", as is shown by the various exhibits filed herewith.

Deponent further states, considering what he knows to be the litigious disposition of the officers of the complainant in this case,
that had the copyright on Merriam's old Webster Dictionaries
119 still been alive, and such similarity appeared in the books under question, this suit would not have been one based on the statements now made that these dictionaries are not Webster, but would have been a suit for infringement of copyright, and that had the complainant's employees their "lexicographer," C. O. Sylvester Mawson, made an examination of the books for the purpose of avoiding trouble, instead of for the purpose of finding something on which his employers could base a vexatious litigation, he would have discovered, and, in the opinion of deponent, actually did discover, exactly the same state of facts as has been herein disclosed by deponent, but in making his affidavit avoided and wrongfully concealed the same from this Court.

GEORGE W. OGILVIE.

Sworn to before me this 10th day of February, 1913.

HELEN REID,
*Notary Public, N. Y. County.*

Registered No. 4090.

No. 25495. Form 2.

STATE OF NEW YORK,
*County of New York, ss:*

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify That Helen Reid before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that *his* signature thereto is genuine, as I verily believe.

120 In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 10th day of February, 1913.

[SEAL.] WM. F. SCHNEIDER, *Clerk.*

121 (*Order Quashing Service of Subpœna and Setting Aside Proceedings, Entered March 2, 1914, by Judge Day.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE.

This cause came on to be heard on the 7th day of February, 1914, upon the motion of George W. Ogilvie, who appeared specially for the purpose of objecting to the jurisdiction of this Court, and asked that the substituted service upon him might be quashed and that all judgments and proceedings based thereon might be set aside and held for naught as to him for want of jurisdiction; and upon the evidence and the arguments of counsel for complainant and for George W. Ogilvie; and due consideration being had

It is ordered that the motion to quash service of the subpœnas and set aside the judgments and proceedings based thereon for want of jurisdiction be granted, and that the service of subpœnas upon Ogilvie in this action be quashed and all of the judgments and proceedings based thereon be set aside and held for naught as to him for want of jurisdiction and that the complainants pay all costs of the proceedings against George W. Ogilvie in this suit.

122 (*Order Denying Petition for Enforcement of Decree, etc., Entered March 2, 1914, by Judge Day.*)

In Equity. No. 27.

G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE.

The petition of the complainant filed herein on January 22, 1914, and the order to show cause granted thereon, coming on to be heard upon the said petition, order to show cause, the joint answer of Arthur J. Saalfield and The Saalfield Publishing Company, and upon the proofs, and after hearing counsel for the respective parties, the Court having this day vacated and set aside the service of subpœna upon said defendant George W. Ogilvie, and set aside and vacated the judgment and proceedings based thereon, for want of jurisdiction,

It is therefore considered and adjudged, that complainant's said petition be and the same hereby is in all things denied, and the restraining order heretofore granted in said order to show cause be and the same hereby is dissolved and set aside, with costs to be taxed by the Clerk against the complainant.

123 (*Opinion. Filed Feb. 20, 1914.*)

In the United States District Court, Northern District of Ohio, Eastern Division.

In Equity. No. 27.

G. & C. MERRIAM COMPANY, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Memorandum.

DAY, *District Judge:*

On December 26, 1908, the complainant filed suit in this court against Arthur J. Saalfield, trading under the name of The Saalfield Publishing Company. Charles R. Miller appeared as attorney of record for Saalfield and at the trial of the case in this Court George F. Bean of Boston appeared.

The case was appealed to the Circuit Court of Appeals, was argued in October 1911, and re-argued in July, 1912. A mandate from the Circuit Court of Appeals was filed in this Court on September 7, 1912. A final decree was entered by this Court on September 12,

1912. On September 20, 1912, notice of motion to tax costs in the entire case was served upon George W. Sieber, attorney for Arthur J. Saalfield.

On December 16, 1912, petition for leave to file supplemental bill was filed and an order for substituted service was made, allowing substituted service to be made upon George W. Ogilvie by service on Weed, Miller & Nason, at Cleveland, and on George F. Bean, in the District of Massachusetts. On December 16, 1912, a
124 supplemental bill, making George W. Ogilvie a defendant, was filed. On February 5, 1913, an order for a decree pro confesso was entered. On June 19, 1913, an interlocutory decree against George W. Ogilvie was filed. On October 16, 1913, a final decree and judgment against George Ogilvie was entered for $81,-363.76.

The complainant did not know of any connection which Ogilvie had with Saalfield or The Saalfield Publishing Company until all of the proceedings in this court had been concluded, and the two hearings had been concluded in the court of appeals and the decree on the mandate entered in this court.

The complainant does not claim to have had any knowledge of Ogilvie's connection with the case in any way until about the time the supplemental bill was filed on December 16, 1912.

It does not appear that Ogilvie ever openly, to the knowledge of the complainant, undertook the defense of the suit.

Under the terms of the contract between Ogilvie and Saalfield, filed in this cause, Saalfield was to fully and fairly comply with all the conditions contained in a decree rendered in the Massachusetts court, between Ogilvie and the complainant, and to bear the expenses incurred by a breach of these conditions, and Ogilvie was to pay any expense in connection with other suits started by the Merriam Company against The Saalfield Publishing Company. By an understanding between Saalfield and Ogilvie, George F. Bean was employed to conduct the defense for Saalfield. George F. Bean engaged Charles R. Miller of Cleveland to assist him in this defense. Bean had charge of the litigation and during its progress he communicated with Saalfield and also frequently communicated
125 with Ogilvie. His expenses and disbursements in the case were paid largely by Ogilvie and sometimes by Saalfield. Mr. Bean paid all the expenses and charges of Charles R. Miller, the Cleveland attorney. Charles R. Miller's active connection with the case ended upon the decree being entered in the Circuit Court by former Judge Tayler of this Court. He took no part in the hearing in the Court of Appeals at Cincinnati, although his name appears upon the brief. According to George F. Bean's testimony his active connection with the case ended upon the submission of the case to the Court of Appeals in July 1912, although after this time he advised Ogilvie concerning the progress of this suit.

About this time Saalfield engaged George W. Sieber, of Akron, as local counsel in the case. In August 1912, Saalfield and Sieber conferred with Bean in Boston, concerning the formal final decree, and a bill for these services was rendered to Saalfield by Mr. Bean.

About September 12, 1912, Charles R. Miller in open Court informed the court that his services in connection with the case were terminated. On the same day George W. Sieber appeared for the Saalfield interests, and on this date a motion to tax costs was served on Mr. Sieber.

On December 16, 1912, by which time it appears that the Saalfield interests had settled with the complainant, the supplemental bill making Ogilvie a party was filed together with the petition for service upon Ogilvie.

It is apparent from the contract that Ogilvie is the owner of the copyrights of all of defendants' dictionaries, also the owner of the plates from which these dictionaries are printed; that he supplies the plates from which the dictionaries are printed and the dictionaries are manufactured, advertised and sold by the Saal-
126 field Publishing Company, and from the sale of these books Ogilvie receives a substantial revenue. By the terms of the contract Ogilvie bore the expense in connection with suits started against the Saalfield Publishing Company by G. & C. Merriam Company, and it is claimed that from these facts Ogilvie is a party to this suit and must respond to the findings of the final decree. It was not endeavored to make Ogilvie a party until the time of the final accounting, when the supplemental bill was filed and an effort made to secure substituted service. It is apparent that Ogilvie could not take advantage of the final decree or be estopped by that decree, had it been favorable, and from a careful examination of the decisions cited by counsel in their briefs, I cannot reach the conclusion that Ogilvie was a party to the litigation, either directly or by estoppel at the time the substituted service was endeavored to be made.

Being of the opinion that Ogilvie was not a party to the record at the time of the attempted substituted service, a motion to quash the service of subpœna will be sustained.

DAY, *Judge.*

Cleveland, Ohio, February 20, 1914.

127 (*Petition for Appeal. Filed April* 15, 1914)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. In Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Petition for Appeal.

The above named complainant conceiving itself aggrieved by the final order made and entered herein on the 2nd day of March, 1914, denying for want of jurisdiction complainant's petition for the en-

forcement of the final decree entered herein against said George W. Ogilvie on October 16, 1913, in the above entitled cause, and by the order made and entered herein on March 2, 1914, quashing the service of the subpœna herein upon said George W. Ogilvie and vacating all the judgments and proceedings based thereon as to said George W. Ogilvie for want of jurisdiction, hereby appeals from said final orders to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that its said appeal may be allowed and that the bond on appeal presented herewith may be approved, and that a citation issue directed to the above named defendants commanding them to be and appear before the said Supreme Court of the United States upon the return day thereof, and that a transcript of the record, proceedings and papers upon which said final orders were made, duly authenticated, may be transmitted to said Supreme Court of the United States to the end that said final orders of this
128 court may be reversed and such order or decree made as to said Supreme Court of the United States may seem just.

Dated April 15th, 1914.

WILLIAM B. HALE,
JAMES A. FORD,
*Counsel for Complainant-Appellant,*
*40 Wall Street, New York City, New York.*

(*Assignment of Errors. Filed April* 15, 1914.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. In Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, and GEORGE W. OGILVIE, Defendants.

Assignment of Errors.

Now comes the above named complainant and appellant herein and says, that in the record and proceedings of said court herein, and in the final orders made and entered herein on the 2nd day of March, 1914, there is manifest error in this, to-wit:

1. That the court erred in denying said complainant's petition for want of jurisdiction.

129 2. That the court erred in quashing the service of subpœnas upon said Ogilvie and in vacating and setting aside all of the judgments and proceedings based thereon as to him for want of jurisdiction.

3. That the court erred in not assuming and retaining jurisdiction to hear and determine upon the merits complainant's said petition for the enforcement of said final decree against said Ogilvie.

4. That the court erred in holding that said Ogilvie was not bound or estopped by the proceedings had and taken in this cause.

5. That the court erred in holding that the substituted service had herein of the subpœna issued upon the supplemental bill herein was insufficient to confer jurisdiction over said Ogilvie.

Wherefore complainant and appellant prays that said final orders of the said District Court of the United States for the Northern District of Ohio, Eastern Division, for the errors aforesaid, be reversed, and that the said court be instructed to reinstate the said proceedings against said Ogilvie and to proceed to the hearing and determination thereof in accordance with law, and for such other relief as may be just.

Dated, April 15, 1914.

WILLIAM B. HALE,
JAS. A. FORD,
*Counsel for Complainant-Appellant,*
40 *Wall Street, New York City, New York.*

130 (*Order Allowing Appeal, Entered April 23, 1914, by Judge Day.*)

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, and GEORGE W. OGILVIE.

On reading and filing the petition for appeal of G. & C. Merriam Company, complaint herein, and the accompanying assignment of errors made and filed herein by said complainant, and upon motion of William B. Hale, counsel for said complainant, it is

Ordered that an appeal to the Supreme Court of the United States from the final orders heretofore made and entered herein on the 2nd day of March, 1914, quashing the service of subpœna herein upon said defendant George W. Ogilvie, and vacating all judgments and proceedings based thereon as against said George W. Ogilvie for want of jurisdiction, and denying complainant's petition for the enforcement of the final decree herein against said George W. Ogilvie for what of jurisdiction, be, and the same hereby is, allowed and a citation directed to issue as prayed, and that a transcript of the record be forthwith transmitted to said Supreme Court of the United States, and that the amount of the security on appeal to be furnished by said complainant-appellant, be, and the same hereby is, fixed at the sum of Two Hundred and Fifty Dollars; and it is further

Ordered that it be, and the same hereby is, certified as follows:

1. That this appeal is allowed direct to the Supreme Court of the United States pursuant to Section 238 of the Act of March 3, 1911, known as the Judicial Code, as a case in which the jurisdiction of the court is in issue.

131 2. That the order of March 2, 1914, denying the complainant's petition for the enforcement of the final decree theretofore rendered against said George W. Ogilvie, and said order of March 2, 1914, quashing the service of the subpœna herein upon said George W. Ogilvie and setting aside all of the judgments and proceedings based thereon as against said George W. Ogilvie, were each of them made solely upon the ground of want of jurisdiction of the court over said George W. Ogilvie, as stated in said orders.

3. That the jurisdictional question presented herein is whether or not the facts and proceedings shown by the record herein are sufficient to subject the said George W. Ogilvie to the jurisdiction of this court.

132 (*Bond on Appeal. Filed April 23, 1914.*)

District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. Merriam Company, a Corporation,
vs.
Arthur J. Saalfield, The Saalfield Publishing Company, and George W. Ogilvie.

Appeal Bond.

Know all men by these presents, that we, G. & C. Merriam Company, a corporation, of Springfield, Massachusetts, as principal, and the Maryland Casualty Company of Baltimore, Maryland, as surety, are held and firmly bound unto the above-named defendants, Arthur J. Saalfield, The Saalfield Publishing Company and George W. Ogilvie, in the sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said defendants, their executors, administrators, successors or assigns, for payment of which well and truly to be made we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated the 17th day of April, 1914.

Whereas said G. & C. Merriam Company, appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse certain orders of the District Court of the United States for the Northern District of Ohio, Eastern Division, entered on the 2nd day of March, 1914, denying, for want of jurisdiction complainant's petition for the enforcement of the final decree entered herein against said George W. Ogilvie in the above entitled cause and quashing the service of the subpœna herein upon said George W. Olgilvie, and vacating all the judgments and
133 proceedings based thereon as to said George W. Ogilvie.

Now, therefore, the condition of this obligation is such, that if the said appellant shall prosecute its said appeal to effect,

and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void, otherwise to remain in full force and virtue.

G. & C. MERRIAM COMPANY,
By K. N. WASHBURN, *Treasurer.*

Approved by—
[SEAL.] H. C. ROWLEY, *President.*

Attest:
GEO. C. HENNICK.

MARYLAND CASUALTY COMPANY,
[SEAL.] By E. H. FISHMAN, *Att'y-in-Fact.*

Approved:
DAY, *J.*

134 THE UNITED STATES OF AMERICA:

To Arthur J. Saalfield, Saalfield Publishing Company, a Corporation, and George W. Ogilvie, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, on the 28th day of May, next, pursuant to a petition for appeal, filed in the Clerk's office of the District Court of the United States for the Northern District of Ohio, wherein G. & C. Merriam Company, a corporation, is appellant, and you are appellees, to show cause, if any there be why the decree rendered against the said appellant, as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 28th day of April, in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States of America, the one hundred and thirty-eighth.

WILLIAM L. DAY,
*United States District Judge.*

Service of the above citation is hereby acknowledged, and appearance of Arthur J. Saalfield, and Saalfield Publishing Company, a corporation, is hereby entered.

____ ____,
____ ____,

April 28, 1914.

135 STATE OF OHIO,
*Northern District of Ohio,*
*Cuyahoga County, ss:*

James A. Ford, being first duly sworn says, that on the 28th day of April, 1914, he served the within citation on Arthur J. Saalfield

by giving to him personally a true and correct copy of the same, and on the same day he served The Saalfield Publishing Company by giving to Arthur J. Saalfield, the President and General Manager of said company a true and correct copy thereof, and on the 29th day of April, he served the same on R. M. Calfee of the firm of Calfee and Fogg, Attorneys of record for George W. Ogilvie in said case, by delivering to said R. M. Calfee a true and correct copy of said citation.

JAMES A. FORD.

Sworn to before me and subscribed in my presence this 4th day of May, 1914.

[Notarial Seal, Cuyahoga County, Ohio.]

F. J. DENZLER,
*Notary Public.*

136 (*Precipe for Transcript with Affidavit of Service. Filed May 6, 1914.*)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. & C. MERRIAM COMPANY, a Corporation, Complainant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Defendants.

Precipe for Record on Appeal.

To the Cl[illegible] of the District Court of the United States for the Northern District of Ohio, Eastern Division:

Pursuant to the provisions of Rule 8 of the Rules of the Supreme Court of the United States, appellant hereby designates the following papers to be incorporated in the transcript of the record on appeal as being all the papers necessary to a consideration of the question to be reviewed, to wit:

1. Supplemental bill filed December 16, 1912.
2. Affidavit and order for substituted service.
3. Subpœna served on Messrs. Weed, Miller & Nason with Marshal's return.
4. Subpœna served on George F. Bean, Esq., in Boston, with Marshal's Return.
5. Interlocutory decree against George W. Ogilvie of June 19, 1913.
6. Final decree against George W. Ogilvie of October 16, 1913.
7. Petition for enforcement of decree and to reach assets, filed January 22, 1914.
8. Motion to quash subpœna and set aside proceedings.

9. Transcript of testimony and exhibits offered in evidence at hearing of motion to quash.

10. Order quashing service of subpœna and setting aside proceedings, entered March 2, 1914.

137 11. Order denying petition for enforcement of decree etc., entered March 2, 1914.

12. Opinion of Judge Day on motion to quash, dated February 20, 1914.

13. Appeal proceedings.

WILLIAM B. HALE,
JAS. A. FORD,
*Counsel for G. & C. Merriam Company, Complainant-Appellant.*

STATE OF OHIO,
*Cuyahoga County, ss:*

James A. Ford being first duly sworn says that on the 5th day of May, 1914, he served the above præcipe on R. M. Calfee of the firm of Calfee and Fogg, Attorneys for George W. Ogilvie in said case, by leaving with said Calfee a true and correct copy thereof, and on the 6th day of May 1914, he served the same on George W. Sieber, Attorney for Arthur J. Saalfield and The Saalfield Publishing Company, a corporation in the above entitled case, by leaving with said Sieber a true and correct copy of said præcipe.

JAMES A. FORD.

Sworn to before me and subscribed in my presence this 6th day of May, 1914.

[SEAL.]

F. J. DENZLER,
*Notary Public.*

138 (*Notice. Filed May* 18, 1914.)

District Court of the United States, Northern District of Ohio, Eastern Division.

No. 27. Equity.

G. AND C. MERRIAM COMPANY, Complainant,
vs.
ARTHUR J. SAALFIELD et al., Defendant-.

Notice.

To George W. Sieber, attorney for Arthur J. Saalfield and The Saalfield Publishing Company, and Calfe and Fogg, attorneys for George W. Ogilvie:

You are hereby notified that the G. and C. Merriam Company, complainant and appellant in the above entitled case, has filed in the Clerk's office of the United States Court for the Northern District of Ohio, Eastern Division, its statement in narrative form of the

testimony on the motion to quash service in the above entitled case.

You are further notified that on the 25th day of May at eleven o'clock A. M. in the United States District Court before the Honorable Judge Killits presiding, said G. and C. Merriam Company will ask said court to approve said statement of testimony.

G. AND C. MERRIAM COMPANY,
By W. B. HALE AND
JAMES A. FORD,
*Its Attorneys.*

STATE OF OHIO,
*Cuyahoga County, ss:*

James A. Ford being first duly sworn says that on the 15th
139 day of May, 1914, he served the within notice on Joseph G. Fogg of the firm of Calfee and Fogg, Attorneys of record for George W. Ogilvie, by leaving with said Fogg a true and correct copy of said notice, and on said 15th day of May he served the notice on George W. Sieber by leaving with J. B. Sieber, the person in charge of the office of George W. Sieber, a true and correct copy of said notice, and on said 15th day of May, 1914, he cause- to be mailed to Wade E. Ellis, Washington, D. C., a true and correct copy of said notice.

JAMES A. FORD.

Sworn to before me and subscribed before me this 16th day of May, A. D. 1914.

[SEAL.]

W. J. SHAW,
*Notary Public.*

140 (*Certificate of Clerk.*)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 27. In Equity.

G. & C. MERRIAM COMPANY, a Corporation, Appellant,
vs.
ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, a Corporation, and GEORGE W. OGILVIE, Appellees.

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the District Court of the United States, within and for said District, do hereby certify that the foregoing pages contain a full, true and complete copy of the record, including the petition for appeal, assignment of errors, and all proceedings in said cause, in accordance with the praecipe for transcript filed by the Appellant, G. & C. Merriam Company, a corporation.

There is also annexed to and transmitted herewith, the citation issued and allowed in this cause.

In Testimony whereof, I have hereunto signed my name and affixed the seal of said Court at Cleveland, in said District, this 13th day of June, A. D. 1914, and in the 138th year of the Independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk*,
By R. C. DEAN,
*Deputy Clerk.*

Endorsed on cover: File No. 24,271. N. Ohio D. C. U. S. Term No. 527. G. & C. Merriam Company, appellant, vs. Arthur J. Saalfield, Saalfield Publishing Company, and George W. Ogilvie. Filed June 15th, 1914. File No. 24,271.

Office Supreme Court, U. S.
FILED
DEC 24 1915
JAMES D. MAHER
CLERK

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 178.

G. & C. MERRIAM COMPANY,

*Appellant.*

*vs.*

ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY, AND GEORGE W. OGILVIE,

*Appellees.*

## BRIEF AND ARGUMENT FOR APPELLANT.

WILLIAM B. HALE,
*Counsel for Appellant,*
27 Cedar Street,
New York, N. Y.

JAS. A. FORD,
*Of Counsel.*

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 178.

G. & C. MERRIAM COMPANY,
Appellant,

vs.

ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY, and GEORGE W. OGILVIE,
Appellee.

## BRIEF AND ARGUMENT FOR APPELLANT.

### I.

### STATEMENT OF THE CASE.

This is a direct appeal from the District Court for the Northern District of Ohio, Eastern Division, under Judicial Code, § 138, upon the sole question of the jurisdiction of that court to enter and to enforce a final decree in personam against appellee George W. Ogilvie. This jurisdictional

question is duly certified by the court below, (Rec. p. 76).

This question of jurisdiction was presented as follows:

On October 16, 1913, a final decree was entered below, upon a supplemental bill, in favor of appellant and against George W. Ogilvie granting a final injunction and awarding appellant the sum of $81,383.76, as profits, damages and costs. On January 22, 1914, after a return of the execution unsatisfied by the Marshal, appellant filed a petition in the cause to enforce the decree and subject assets to its payment. (Rec. p. 20, *et seq.*) Upon the return day of the order to show cause, defendant George W. Ogilvie appeared specially to object to the jurisdiction of the court, and made a countermotion to quash the service of the subpœna upon him and to vacate the judgment and all proceedings had against him based thereon, for want of jurisdiction. (Rec. 31). A hearing was had, proofs were taken and witnesses were examined in open court. (Rec. p. 33). Thereafter, on March 2, 1914, the court below entered two orders, one quashing the service of the subpœna upon said Ogilvie, and vacating the judgment and proceedings against him for want of jurisdiction, (Rec. p. 71); the other order reciting such action, and denying appellant's petition for want of jurisdiction. (Rec. p. 72). The present appeal is from these two orders, (Rec. p. 74). The court below certifies that both orders were "made solely upon the ground of want of jurisdiction of the court over said George W.

Ogilvie, as stated in said orders," (Rec. p. 77), and further certifies:

> "That the jurisdictional question presented herein is whether or not the facts and proceedings shown by the record herein are sufficient to subject the said George W. Ogilvie to the jurisdiction of this court." (Rec. p. 77).

The precise questions presented are: (1) Has a District Court jurisdiction to bring in, by supplemental bill, as a party to a pending suit, a resident of another district who has an interest in the subject-matter, acquired *pendente lite*, and who voluntarily comes into the district of suit, by counsel retained and paid by him, and actually and exclusively conducts and controls the defense, thereby invoking the jurisdiction of the court for the protection of his own interests under circumstances making the decree *res adjudicata* against him? (2) If so, can such jurisdiction be exercised by substituted service upon such party's chosen counsel, who have appeared and represented him in the suit?

The original bill was filed by petitioner, a corporation organized under the laws of the State of Massachusetts, in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, against one Arthur J. Saalfield, a citizen and resident of the State of Ohio, and of said Northern District of Ohio, Eastern Division. The bill was for unfair and fraudulent competition in the publication and sale of dictionaries.

Said defendant Saalfield published and sold

the dictionaries complained of in said bill as licensee of said Ogilvie, who owned and still owns the copyrights thereof, and the plates from which said dictionaries are printed. The contract between them provided that Ogilvie should receive, as royalty, a share of the net profits from the sale of said dictionaries by Saalfield, and further provided that Ogilvie would defend any suit brought by petitioner against Saalfield on account thereof. He actually did defend this suit, and paid the expense thereof. (Rec. pp. 5, 29, 36, 37, 39, 41, 44, 47, 48, 55, 74.)

Pending said suit, Saalfield incorporated his business under the name of The Saalfield Publishing Company, to which he transferred the business of publishing said dictionaries, and afterwards, on June 24, 1910, while said suit was still pending undetermined, the contract between Ogilvie and Saalfield was cancelled, and Ogilvie made a new contract with said corporation. Ogilvie's interest in the subject-matter of the suit rests wholly upon this contract and the ownership of the books involved. (Rec. p. 24 *et seq.*) This contract like the former one provided that Ogilvie should defend suits brought by petitioner, and Ogilvie continued to defend the pending suit as he had theretofore done. (Rec. pp. 5, 29, 36, 37, 39, 41, 44, 47, 48, 55, 74.)

Ogilvie is a citizen and resident of the City and State of New York, in the Southern District of New York. (Rec. pp. 12, 37.) Nevertheless, he voluntarily came into said Northern District of Ohio, by counsel employed, retained and

paid by him, and pursuant to his said contracts with defendant Saalfield and The Saalfield Publishing Company, actually, actively and exclusively conducted and controlled the defense of said suit. Saalfield took absolutely no part in said defense until after an interlocutory decree had been directed against him personally for an injunction and an accounting of his unlawful profits. All this appears without any controversy from the testimony of Ogilvie's own counsel, offered by him in support of his motion to quash (Rec. p. 38 *et seq.*) and the uncontradicted testimony of said defendant Saalfield (Rec. pp. 47, 48).

Appellant had no knowledge of Ogilvie's interest in, and actual defense of, said suit until after the entry of the interlocutory decree therein, Ogilvie having conducted said defense in the name of said defendant Saalfield. The order denying appellant's petition and quashing service of the subpœna and setting aside the proceedings was expressly based upon this fact. (See Opinion of Judge Day, Rec. p. 72 *et seq.*). But upon the first day of the hearing before the Master, under the reference made by the interlocutory decree, appellant discovered such facts, and obtained a copy of the contract under which Ogilvie had defended the suit. Forthwith, and on the same day, appellant obtained leave of court and filed its supplemental bill bringing in said Ogilvie as a party to the record, thereby accepting him as an adversary, and rendering the estoppel mutual. (Rec. p. 1). An order for substituted service was made and the subpœna was

served upon Ogilvie in accordance therewith, by serving it upon his solicitor within the district, and also upon his counsel without the district. (Rec. pp. 13, 15). Ogilvie had actual and timely notice of the pendency of the supplemental bill against him, for his counsel promptly sent him the subpœna and order for substituted service (Rec. pp. 42, 43), receipt of which is admitted in writing by said Ogilvie (Rec. pp. 50, 53, 54), and he filed a voluntary affidavit, in which he argued the merits at large, upon a motion for an injunction *pendente lite*. (Rec. p. 62 *et seq.*). The purpose of the subpœna and the order for substituted service, which is only to give notice to the defendant, was, therefore, attained.

With full actual notice thereof, Ogilvie allowed the supplemental bill to be taken *pro confesso* against him, and in due course interlocutory and final decrees were entered against him for an injunction and the recovery of $81,383.76 profits and costs. All these proceedings have now been vacated, and appellant's petition for enforcement of the decree denied, solely for an alleged want of jurisdiction over said Ogilvie.

Unless the orders appealed from are reversed, appellant will lose the benefit of the decree which it has obtained after five years litigation with Ogilvie, and will be compelled to litigate again with Ogilvie matters already once litigated with him as an adversary.

## II

### Assignment of Errors.

The assignments of error all raise the same jurisdictional question in various forms, and may be summarized as follows, (Rec. p. 75):—

(1) That the court below erred in denying appellant's petition, in quashing the service of the subpœna, and in vacating the proceedings and decree, for want of jurisdiction.

(2) That the court below erred in holding that the substituted service of the subpœna upon Ogilvie's attorneys in the principal suit was insufficient to subject Ogilvie to the jurisdiction of the court upon the supplemental bill.

## III

### Argument.

#### I.

OGILVIE WAS PRIVY TO THE ORIGINAL SUIT, AND WAS AN ACTUAL, ALTHOUGH NOT AN OSTENSIBLE PARTY THERETO, IN SUCH A REAL SENSE THAT THE DECREE WILL BE *res judicata* AGAINST HIM.

The facts relied upon to show that Ogilvie was privy to the original suit as an actual, although not a nominal or ostensible, party thereto, and

bound by the proceedings and decree already had and taken and to be taken therein, are briefly as follows:

Ogilvie is the owner of the copyrights of all defendants' dictionaries, and as such controls and is interested in the publication and sale of said dictionaries. He also owns the plates from which these dictionaries, the subject matter of the suit, are printed. He has contracted successively with defendants Saalfield and The Saalfield Publishing Company for the publication and sale of these dictionaries which he thus owns. The last and now existing contract was made *pendente lite*, on June 24, 1910. (Rec. pp. 6, 24). These contracts provide that Ogilvie *leases* to defendants Saalfield and The Saalfield Publishing Co. the plates from which the dictionaries are printed, and grants to said Saalfield and The Saalfield Publishing Co. an exclusive *license* to publish said dictionaries during the term of their copyright. The contracts further provide that Saalfield and The Saalfield Publishing Co. shall manufacture, advertise and sell these dictionaries, under said license, paying all the expenses thereof, and that the net profits shall be divided between Ogilvie and The Saalfield Publishing Co. The contract is thus *practically a contract of partnership*. Saalfield and his corporation is the agent of their co-partner Ogilvie in this joint adventure. The contracts further provide that said dictionaries shall be published under the specific titles by which they have been published in the past, and that no change shall be made in said titles without "the approval and consent in

writing of either George W. Ogilvie or Arthur J. Saalfield having been procured." The form and use of these titles is the matter complained of in the suit. It is provided further that the contents of the dictionaries may not be changed substantially without like consent and approval. It was expressly stipulated that "the present arrangement of printed matter on the title pages of all of said dictionaries [shall be kept] unchanged unless under the direction or with the approval and consent of the party of the first part," i. e. Ogilvie. The contract was not to be assignable except with the consent in writing of Ogilvie, and in certain contingencies the contract was to terminate and Ogilvie be reinvested with all rights in said dictionaries. (Rec. p. 24 *et seq.*) It thus appears that from the very beginning Ogilvie has been *jointly interested* with Saalfield in the subject-matter of this suit, and that his interest depends upon a contract made *pendente lite*. His rights and interests are not merely similar to Saalfield's, but are identical therewith. (See *Litchfield* v. *Crane*, 123 U. S. 549, 551.)

By reason of this contract, a previous decree in favor of appellant against said Ogilvie, rendered in the First Circuit, was held by the Circuit Court of Appeals for the Sixth Circuit, in the case below, to be *res judicata* as between appellant and Saalfield, because Saalfield and Ogilvie were in privity (*Merriam* v. *Saalfield*, (C. C. A.) 190 Fed. 927, 932). Upon the rehearing in that court, it was said that Saalfield was in substantial effect, after this contract, the defendant in the

Massachusetts case against Ogilvie, (198 Fed. 369, 371).

This contract further provided that Ogilvie would bear the expense in connection with any suits brought by petitioner against Saalfield in connection with these dictionaries, (Rec. p. 29), Saalfield and Ogilvie construed this as requiring Ogilvie to defend the present suit. (Rec. pp. 39, 55). Accordingly, Ogilvie not merely paid the expenses of the defense of the suit, (Rec. p. 48 *et seq.*), but he assumed full charge and control of the defense and conducted it from the very beginning in December, 1908, until after the reversal by the Circuit Court of Appeals in 1912, and the coming down of the mandate. (Bean, Rec. p. 38 *et seq.*; Saalfield, Rec. pp. 47, 48.) He took part in the settlement of the interlocutory decree upon the mandate. (Rec. pp. 36, 40, 48). He was notified of the commencement of the suit immediately. He retained the solicitors and counsel who appeared in Saalfield's name and defended the suit. He paid them their fees and expenses. Through his said counsel he prepared and filed the answer. He offered evidence in defense of the bill. His counsel argued the case at final hearing and on their motion the bill was dismissed. He opposed complainant's appeal to the Circuit Court of Appeals, and his counsel argued the case for defendant upon such appeal and upon the rehearing on appeal. He employed and retained Mr. Lawrence Maxwell as additional counsel to oppose said appeal and paid him his fees. (Rec. pp. 41, 42). His counsel reported to him instead of to Saalfield during the progress

of the case. (Rec. p. 44). He thus actually and exclusively litigated this case as appellant's adversary. He had and exercised every right which a party to the record could exercise.

All of the above facts are established without any controversy and by the testimony of Ogilvie's own solicitors and counsel called by him as witnesses in support of his motion to quash. The contract giving Ogilvie the right, and making it his duty to defend and control the suit is before the court. Ogilvie's counsel in the prior Boston suit, Mr. Bean, likewise appeared as leading counsel for defendant in this suit, retained and paid by Ogilvie and defending Ogilvie's interest in the subject matter, although acting in the name of the nominal defendant. He defended the joint and inseparable interest of both Saalfield and Ogilvie.

Saalfield, the ostensible defendant, did absolutely nothing in regard to the defense and paid no attention whatever to the suit until confronted with a personal liability for profits under the interlocutory decree. Saalfield paid no part of the attorney's fees and the expenses of the suit up to that time (Rec. p. 48). It was all left absolutely in Ogilvie's hands. Ogilvie controlled the defense and the defense was made at least as much for the protection of his own interests as for those of Saalfield, (Rec. p. 47). The only bill ever rendered to Saalfield was an insignificant one for "*retainer* and services" after decision of the Court of Appeals in the main case. (Rec. pp. 41, 49).

During the progress of the suit, and after the interlocutory decree was entered, appellant learned the above facts as to Ogilvie's actual and exclusive defense of the suit from the examination of Saalfield before the Master. Forthwith, and before any further proceedings were taken, petitioner filed its supplemental bill, bringing Ogilvie in as an actual party to the record, so as to have the benefit of the above facts, and bind Ogilvie by the decree as *res judicata*. This accepted Ogilvie as an adversary, and put the cause in such a condition that the final decree would on its face be a mutual estoppel.

The authorities are clear and unanimous that the above recited facts make Ogilvie a privy and substantial party to the suit, bound by all the proceedings had and taken therein, and the decree rendered or to be rendered is, and will be, *res judicata* as to him. *Lovejoy* v. *Murray*, 3 Wall, (U. S.) 1, 18; *Robbins* v. *Chicago*, 4 Wall (U. S.) 657, 672; *Litchfield* v. *Crane*, 123 U. S. 527; *Rumford Chemical Works* v. *Hygienic Chemical Co.*, 215 U. S. 156; *Bigelow* v. *Old Dominion Copper Mining Co.*, 225 U. S. 111.

The decisions to the same effect in the Circuit Courts of Appeal and the Circuit Courts are very numerous. A few only of such decisions are here cited. *David Bradley Mfg. Co.* v. *Eagle Mfg. Co.*, (C. C. A.), 57 Fed., 980; *Hauke* v. *Cooper* (C. C. A.), 108 Fed., 922; *Empire State Nail Co.* v. *American Solid Leather Button Co.*, 71 Fed., 588; *Claflin* v. *Fletcher*, 7 Fed., 851; *Bank of Commerce* v. *City of Louisville*, 88 Fed., 398; *Castle* v.

*Noyes*, 14 N. Y., 329; *Carey* v. *Roosevelt*, 91 Fed., 567; 83 Fed., 242; *Theller* v. *Hershey*, 89 Fed., 575; *Tootle* v. *Coleman* (C. C. A.), 107 Fed., 41.

In *Lovejoy* v. *Murray*, 3 Wall. 1, 18, (cited *supra*) Mr. Justice Miller said:

> "3. Is the judgment of plaintiff against the sheriff Hayden, conclusive against the defendants in this action?
>
> "The facts on which this proposition is based are the giving of the bond of indemnity by the defendants, and that Hayden when sued notified them of the suit and called on them to defend it; that they did employ counsel to defend it and that the counsel so employed had exclusive control of the defense of the suit."

Justice Miller held that these facts made the judgment against the sheriff *res judicata* against defendant in the subsequent suit, though he had not been named as a party to the suit against the sheriff. He said:

> "We have already shown that the effect of giving the bond was to make defendants principals in the transaction, and that so far as the action of the sheriff after that was a trespass, it was directed by them, and was for their benefit. With a just appreciation of their relations to each other in the transaction, he called on them when sued to assume the defense; and they did so. They were defending their own acts, although the suit was in the sheriff's name. *They had full right to make all defense there which they could make here. They could adduce witnesses and cross-examine those of plaintiff, and could have taken an appeal.* The case is

wanting in none of the elements so happily stated by Mr. Greenleaf as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. *Under the term parties, in this connection, the law includes all who are directly interested in the subject-matter and had a right to make defense, or to control the proceedings; and to appeal from the judgment.* This right involves also the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them are equally concluded by the same proceedings.' 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and wherever this identity is found to exist all are alike concluded.' " (To same effect is *Litchfield* v. *Crane*, 123 U. S. 549).

Language more appropriate to the facts of the case at bar could not have been used. Ogilvie

had and exercised all the rights above enumerated as essential to bind him by the proceedings.

> "A party who contributes money for the purpose of employing counsel and carrying on a litigation, under a contract with a party to the record, must of necessity be held to have the right to take such action in the case as will protect his own interest in it. * * * It seems to me that the persons who under such a contract as that, actually contribute money for the purpose of carrying on a suit, are authorized to go into that court and use the name of the party to the record and in making such motions and taking such steps as are necessary for the protection of their particular interest in it." *Miller* v. *Leggett & Myers Tobacco Co.*, 2 McCrary (U. S.), 375, 377, 378, s. c. 7 Fed. 91. *Quoted* with approval, and *followed* in *Theller* v. *Hershey*, 89 Fed., 575.

In *Carey* v. *Roosevelt*, 83 Fed., 242, Judge Coxe said:

> "It now appears that the defendants had the same opportunities to defend as though actually parties to the record. * * * The defendants were informed of every important step in the litigation and the suit was defended at their instance and request, they paying the expenses thereof. In short, they voluntarily made themselves privies to that action and had precisely the same benefits therefrom as if they were named as defendants. Had they been so named they could have done nothing more. They have had their day in court and should not now be heard to dispute a claim which they have already disputed without success. The doctrine that a party directly interested in the

> resulted of an action, who assumes and did pay for its defense, is not permitted thereafter to dispute the judgment there rendered, has been frequently recognized and enforced in the Federal Courts."

In *David Bradley Mfg. Co.* v. *Eagle Mfg. Co.* (C. C. A.), 57 Fed., 980, it was held there where a suit for infringement of a patent is brought against a firm that is a branch of the company that manufactures the infringing device, and such company conducts the defense, a decree for complainant is conclusive as against the company conducting the defense. Judge Jenkins said:

> "The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant *was in fact the real party to that litigation*, and so far as the decree there is *res adjudicata*, it is as effectively concluded thereby as if it were the actual defendant to the record." Citing *Lovejoy* v. *Murray*, 3 Wall, 1, 18, 19; *Robbins* v. *Chicago*, 4 Wall, 657, 672.

In *Empire State Nail Co.* v. *American Solid Leather Button Co.*, 71 Fed., 588, it was held that a corporation which assumes the defense of a patent infringement suit brought against one who purchased the infringing articles from the corporation, is estopped by the judgment to the same extent as if it had been a party. The decree is *res judicata* as to such corporation. This is substantially the situation here. Ogilvie owns the dictionaries through his copyrights, and the plates from which they are printed, and engages Saalfield to manufacture and sell for one-half of

the net profits. Ogilvie agreed to assume, and did assume entire control of the defense of this suit against Saalfield for performing his part of such contract, and is bound by the proceedings and decree in the suit which he has thus defended, because he has had his day in court, and, therefore, was in court, and subject to its jurisdiction.

In *Claflin* v. *Fletcher*, 7 Fed., 851, Gresham, *D. J.*, said:

> "The judgment of the state court is conclusive between the same parties and their privies. The defendants in the first suit were the agents of the defendants in this suit. Through these agents the present defendants resisted Claflin & Co.'s claim of ownership in the state court. *Extrinsic evidence is admissible* to prove that *a real party* in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record."

Saalfield was substantially Ogilvie's agent in earning the net profits which were divided. Ogilvie defended the suit in Saalfield's name. He was a real party in interest, and in the words of Judge Gresham, "is concluded by the judgment as effectually as if he had been a party to the record." Appellant should not be compelled to rely upon "extrinsic evidence," in a new suit, at a later day, when perhaps it will not be available. Ogilvie should be brought in now and bound in his own name.

In *Tootle* v. *Coleman*, (C. C. A.), 107 Fed., 41, Judge Sanborn said:

> "One who instigates another to a wrongful act, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided."

Ogilvie not only instigated Saalfield to do a wrongful act, but participated therein, and expressly contracted that such act should be done under his supervision. When such act was called in question in court, he assumed and conducted the defense.

The decision in *Rumford Chemical Works* v. *Hygienic Chemical Co.*, 215 U. S. 156, recognizes the doctrine here contended for, and is readily distinguished upon the facts. It was there held that the single fact that a person had contributed to the expense of a former suit did not alone bind him by the result thereof, it appearing that he had only an indirect interest, and had no "right to intermeddle in any way in the conduct of the case." The indirect interest there was apparently only in creating a favorable precedent in contemplation of a subsequent suit for a like but independent infringement. The decision in *Bigelow* v. *Old Dominion Copper Mining Co.*, 225 U. S. 111, likewise holds only that mere contribution to the defense of an action against one joint *tort feasor*, "because of interest in the decision as a judicial precedent which might influence the decision in his own case," was not sufficient to create an estoppel. The distinction between such

cases and the case at bar is very clear. Ogilvie was directly interested in the subject matter of the litigation and he assumed full and exclusive conduct and control of the defense, *in addition* to paying the expenses thereof. It is this fact of full, exclusive, and actual control and management of the defense which distinguishes this case from all the cases which hold that mere contribution to the expenses of a suit does not create an estoppel. (For example, see *General El. Co. v. Morgan, etc., Co.* [C. C. A.] 168 Fed., 52, 56.)

Ogilvie was a privy to the suit both legally and actually in every possible sense. He acquired an interest *pendente lite*. He litigated his rights adversely with appellant. He had and exercised all the rights of a party, and was represented in the suit by Saalfield, his licensee and agent, in whose name he acted. He has had his day in court, and having thus come into court, he is in court for all purposes until the end of the suit by entry of a final decree.

## II.

THE DISTRICT COURT ERRED IN DECLINING JURISDICTION UPON THE SOLE GROUND THAT OGILVIE'S DEFENSE OF THE SUIT WAS UNKNOWN TO APPELLANT UNTIL AFTER THE INTERLOCUTORY DECREE, AND THAT, THEREFORE, OGILVIE WAS NOT BOUND.

It would seem that the question whether Ogilvie is bound by the proceedings in the suit against Saalfield as the ostensible defendant, which is one

of the issues tendered by the supplemental bill, is a matter of defense to the merits, rather than a preliminary jurisdictional objection, and that by contesting this question Ogilvie has submitted to the jurisdiction of the Court.

Be this as it may, the District Court quashed the proceedings against Ogilvie and denied appellant's petition to enforce the final decree upon the sole ground that Ogilvie was not estopped by the proceedings in the suit which he defended, and therefore, that the Court had no jurisdiction to bring him in, because such defense of the suit by him was not known to appellant until the interlocutory decree on the mandate from the Circuit Court of Appeals had been entered in the District Court. (*Opinion* of Judge Day, Rec. p. *72 et seq.*)

The doctrine invoked by Ogilvie upon his motion to quash, and applied by the learned District Court, is that in order that one not a party to the record may be estopped by the judgment because of participation in the defense, his conduct in that regard must be either open and avowed, *or otherwise known* to the opposite party, so that such party also will be concluded. The reason given for this rule is that estoppels must be mutual, and that both parties must be bound or neither will be bound. *Lane* v. *Welds*, (C. C. A.) 99 Fed. 286, 288, 289; *Andrews* v. *Pipeworks* (C. C. A.), 76 Fed. 166, 173; *Cramer* v. *Manufacturing Co.* (C. C. A.), 93 Fed. 636, 637; *Hanks Dental Assn.* v. *International Tooth Crown Co.* (C. C. A), 122 Fed. 74; *La Croix* v. *Lyons*, 33 Fed. 437, 438; *Jefferson Electric etc. Co.* v. *Westinghouse etc. Co.*

(C. C. A.) 139 Fed. 385; *Singer Mfg. Co.* v. *Cramer* (C. C. A.), 109 Fed. 652, 656; *Westinghouse etc. Co.* v. *Jefferson etc. Co.*, 135 Fed. 365, 367.

We have no disposition to dispute this doctrine, although many cases ignore such requirement. Neither the rule itself, nor the reason upon which the rule rests, has any application to the present case. All this line of authorities goes back to the case of *Schroeder* v. *Lahrman*, (26 Minn. 87, 1 N. W. Rep. 801), in which case the Court said:

> "It would be anomalous in judicial proceedings that the rights of a party should be concluded as between him and one whom he does not know to be an adversary, and as to whom he does not submit his rights for adjudication." *Quoted* with approval and *followed* in *La Croix* v. *Lyons*, 33 Fed. 439.

In the case at bar, Ogilvie's control of the defense, made in the name of Saalfield, and his interest in the subject-matter, became known to appellant *during the progress of the suit*, and before final decree. It became so known to appellant shortly after the entry of the interlocutory decree. This decree is interlocutory not merely because it directs an account to be taken, but because it reserves for hearing and determination certain specific questions as to the violation of appellant's rights, and directs the taking of further proofs in regard thereto. The case was still pending, the final hearing had not been had, and the final decree had not been entered. Forthwith upon learning of Ogilvie's act-

ual defense of the suit, and before any further proceedings had been taken, appellant accepted him as an adversary, and took steps to name him as a party defendant upon the record, *so that both parties might be bound by the litigation had, and the estoppel be mutual.* In short, this doctrine has no application here because Ogilvie's defense not only became known to appellant, but the estoppel will be mutual. Appellant has formally submitted its rights for adjudication as between it and Ogilvie.

There is justice in the rule that one who speculates upon the outcome of a litigation, and conceals his actual defense thereof until the final adjudication, intending to claim the benefit of it, if favorable, and to disclaim its binding force as to him, if unfavorable, should be precluded from any such inequitable advantage. It is in this class of cases that the doctrine has been usually applied. The cases all admit, that if such defense is known to the opposite party, both parties will be bound. Known when? Obviously, if it becomes known during the progress of the cause, and in time to give the opposite party an option of going on with the suit, and becoming bound as to his actual adversary, or of dismissing said suit if unwilling to be so bound, the knowledge comes in time. In other words, if such actual defense of a suit by one interested therein, but not named as a party, becomes known to the plaintiff at any time before the final decree, both parties will be bound by it as *res judicata.* It was so held by Judge Shiras in *Eagle Mfg. Co.* v. *Miller,* (41 Fed. 351, 357),

where, as in this case, the fact was learned upon the taking of evidence for the final hearing, and the Court granted leave to bring in the defending party by amendment so as to be bound by the decree. But as no subpœna was served, no personal decree against the new party was rendered. In the case at bar, subpœna was issued and served. (See *post*, p. 37).

In *City of Mankato* v. *Barbour Asphalt Paving Co.*, (C. C. A.), 142 Fed., 329, 339, the estoppel of a judgment was rejected because the participation in the defense was not known *"while the case was progressing."* So in *Jefferson, etc., Co.* v. *Westinghouse, etc., Co.* (C. C. A.), 139 Fed., 385, 386, the Court said:

> "Having concealed its connection with the Catskill *suit while it was pending*, it is too late now for the Diamond Meter Co. to set up the final decree in that case as an estoppel against the complainant."

The error of the District Court consists in overlooking or disregarding the fact that *the suit was still progressing* when appellant learned of Ogilvie's relation to it as an actual, though not ostensible party. If appellant had been then unwilling to have the decree become *res judicata* between it and Ogilvie, it had the opportunity, and the option, of dismissing its bill. Ogilvie then had no option, for he had exercised it by voluntarily coming into the case. Appellant accepted Ogilvie as its adversary, and consented to be bound by the adjudication of the controversy between them. Ogilvie has no grounds of complaint.

## III

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, HAS JURISDICTION NOTWITHSTANDING OGILVIE RESIDES IN THE SOUTHERN DISTRICT OF NEW YORK, BECAUSE: (A) HE SUBMITTED TO THE JURISDICTION, AND WAIVED OBJECTIONS, BY VOLUNTARILY COMING IN AND DEFENDING THE SUIT; AND (B) THE SUPPLEMENTAL BILL IS A DEPENDENT AND ANCILLARY PROCEEDING.

Jurisdiction of the original bill rested upon diverse citizenship. Appellant, the complainant in said bill, is a corporation organized under the laws of the State of Massachusetts, and a citizen and a resident of the District of Massachusetts. Saalfield, the sole defendant in the original bill, is a citizen of the State of Ohio, and a resident of the Northern District of Ohio, Eastern Division. Ogilvie is a citizen of the State of New York, and a resident of the Southern District of New York.

(A.) There is thus no question of the general federal jurisdiction of either the original bill or the supplemental bill. The necessary diverse citizenship exists. Ogilvie's right to be sued only in the district in which he resides is a personal privilege which he may waive, and which he did waive by invoking the jurisdiction of the District Court for the Northern District of Ohio, Eastern Division, when he went there by his counsel, and defended the original suit for the

protection of his own personal interests in the subject-matter. *Interior Construction, etc. Co.* v. *Gibney*, 160 U. S. 217, wherein the court said:

> "But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive at his election, and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance, without taking the objection." Citing many cases. See also In *re Keasbey*, 160 U. S. 221.

Ogilvie's assumption and exclusive control and conduct of the defense, which gave him his day in court, and bound him by the proceedings had and taken upon his motion, or against his opposition, amounts to a general appearance, and is a waiver of any right he might have had to object to the jurisdiction of the court in that district. Ogilvie voluntarily went into the district to defend a suit in which he was directly a party in interest. During all the proceedings in that suit he has been in that district and in that suit through his solicitors and counsel. If he did not wish to submit himself to the jurisdiction of that court, and to abide by its decree, he could have remained out of the jurisdiction. He elected, however, to go into the district and invoke the jurisdiction of that Court for the protection of his interests. He is concluded by such election.

He is in the Ohio district by his voluntary act for all the purposes of the suit. Why should he have a right to have his cause tried twice?

(B.) Moreover, the supplemental bill against Ogilvie and the other defendants is a dependent and ancillary proceeding, dependent upon, and ancillary to, and, in fact a mere continuation of, the original bill. It is a supplemental bill in the nature of a bill of review, filed by leave of court. The federal courts have jurisdiction of such ancillary suits and proceedings wholly without regard to the citizenship or residence of the parties, the amount in controversy, or the existence of any federal question. The jurisdiction of such ancillary suits depends wholly upon the jurisdiction of the original bill, which, in this case, could not be, and is not, disputed. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. (U. S.) 609, 633; *Johnson* v. *Christian*, 125 U. S., 642; *Dewey* v. *West Fairmount Gas Coal Co.*, 123 U. S. 229; *Brun* v. *Mann*, (C. C. A.) 151 Fed. 145; *Campbell* v. *Golden Cycle M. Co.*, (C. C. A.), 141 Fed. 610; *Loy* v. *Alston*, (C. C. A.), 172 Fed. 90, 94.

An ancillary bill or proceeding, within the meaning of this rule as to federal jurisdiction, is one which seeks either (1) to aid, enjoin or regulate the original suit; or (2) to restrain, avoid, explain or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit. (See cases last cited, *supra.*)

For the purposes of federal jurisdiction, the

term "ancillary" is given a broad and liberal interpretation. As this court has said:

> "It is objected that the present bill is called a supplemental bill, and is brought by a defendant in the original-suit, which is said to be a violation of the rules of equity pleading; and that the subject matter, and the new parties made by the bill, are not such as can properly be brought before the court by that class of bills.
>
> "But we think that the question is not whether the proceeding is supplemental and ancillary, or is independent and original in the sense of the rules of equity pleading; but whether it is supplemental and ancillary, or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. * * * This court has decided many times, that when a bill is filed in the circuit court to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that *the court will proceed* in the injunction suit *without actual service of subpœna on the defendant, and though he be a citizen of another state*, if he were a party to the judgment at law. * * *
>
> "It is objected that Pratt and White and the Milwaukee and St. Paul Railway Company *were not parties to that suit* and cannot, therefore, be compelled to yield their right to litigate with a citizen of Wisconsin in the courts of that State. * * * It would, indeed, be very strange if these parties can come into court by a petition, and get possession of that which was the subject of litigation, and then when the wrong they

> have done by that proceeding is to be corrected, they shall be permitted to escape by denying that they were parties to the suit." *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. (U. S.) 633, 634.

Every word of the above quotation applies to the situation of Ogilvie in the case at bar. He participated in, and procured to be done, the wrongful acts complained of in the original bill. He came into court, and litigated with appellant the property rights in the trade name "Webster" as applied to dictionaries, and particularly as applied to the copyrighted dictionaries which he owns. He was a party to that suit in the sense of the term as used in the doctrine of *res judicata*. He procured a dismissal of appellant's bill, and now when, after years of litigation, that decree has been reversed, against his opposition, and appellant's rights have been established, he seeks to escape by denying that he was a party to the suit.

Ancillary proceedings, for the purpose of federal jurisdiction, have been defined as follows:

> "A suit or legal proceeding is said to be dependent on another, or ancillary to it, when such suit or proceeding is so intimately connected with the other as to constitute an integral part or a mere continuation of it. Cross bills, supplemental bills, original bills in the nature of supplemental bills, bills of review, bills of revivor, and generally, all bills brought to impeach decrees or to carry decrees into effect, as well as suits or petitions of intervention, are ancillary proceedings." *2 Street's Fed. Eq. Pr.*, §1228, citing many cases.

> "The remedy by supplemental bill, or by original bill in the nature of a supplemental bill, is an ancillary proceeding, being dependent on the prior or principal suit. Consequently jurisdiction in such suits is dependent on the jurisdiction in the principal suit." *2 Street's Fed. Eq. Pr.*, §1238.

Of course, a dependent or ancillary suit cannot be maintained to adjudicate the claims of those who were not parties to, or in privity with, the original suit, except in the case of those who claim an interest in the property in the custody of the court. *Campbell* v. *Golden Cycle M. Co.*, (C. C. A.) 141 Fed. 610; *Dunn* v. *Clarke*, 8 Pet. (U. S.) 1. But as already shown, Ogilvie is in privity with the original suit, and an actual party thereto in the larger sense of the term. (See *Lovejoy* v. *Murray*, 3 Wall. 1, 18, defining the term "parties.") Also, Ogilvie's interest in the subject-matter was acquired by him *pendente lite* by the contract of June 24, 1910, (Rec. p. 24 *et seq*), made with The Saalfield Publishing Company, which Company had in turn acquired all its rights *pendente lite* from Arthur J. Saalfield, the original defendant. (*Supplemental Bill*, Rec. pp. 4, 5.) Ogilvie is, therefore, both a "party" and a "privy" to the original suit, and a privy by contract with the original defendant. He is bound by the proceedings against Saalfield and is a proper party to a supplemental and ancillary bill. *O'Connor* v. *O'Connor*, 146 Fed. 994; *Merriam* v. *Saalfield*, (C. C. A.) 190 Fed. 927, 932, wherein the Court said:

> "If a third party may thus come into the acquisition of rights involved in pending liti-

> gation without being bound by the final judgment, and require a suit *de novo* in order to bind him, he might, pending that suit, alienate that right to another with the same result, and a final decree bearing fruit could never be reached."

In *Western Telephone Mfg. Co.* v. *American Electric Co.*, 141 Fed., 908, the facts are strikingly similar to the case at bar. In that case pending suit for infringement of a patent the defendant transferred its business to another corporation. It was held that the purchaser assumed such relation to the subject matter of the suit that, after decree finding infringement it might be brought in by supplemental bill and subjected to the injunction already granted and to liability for damages under such decree for acts of infringement committed by it subsequent to such purchase. The court said:

> "It is now sought by the amended supplemental bill to subject this defendant to the injunctional order entered in the original cause, and to require an accounting as to acts of infringement committed by this defendant subsequent to those committed by the original defendant. * * * While there is some ground for the claim that this defendant conducted the defense in the original suit, there is lacking proper allegations as to the mutuality of the matters claimed to operate as an estoppel. It is too well settled to require citation of authorities that one taking the *res, pendente lite*, by assignment or transfer, is bound by the judgment of the court as to that *res*. It seems clear on authority that in a case like the one now presented, the court has the power to subject

> the assignee or transferee to the terms of the original decree so far as it affects the *res.*"

In *Eagle Mfg. Co.* v. *Miller,* 41 Fed., 351, which was a suit in the Southern District of Iowa, a corporation created under the laws of the State of Ohio, which had assumed control and management of the defense, was allowed to be brought in by amendment to the bill, upon the discovery of this fact.

The proceedings below, in the case at bar, is strictly a supplemental bill in the nature of a bill of review, and within all the decisions is an ancillary proceedings which the District Court for the Northern District of Ohio, Eastern Division has jurisdiction to hear and determine as between the parties thereto. It could be brought in no other court.

The only question remaining is the sufficiency of the proceedings taken by way of substituted service to bring Ogilvie within such jurisdiction.

## IV

SUBSTITUTED SERVICE, OR MERE ACTUAL NOTICE, IS SUFFICIENT TO SUBJECT A PARTY TO THE JURISDICTION OF THE COURT IN ANY ANCILLARY PROCEEDING, AND SUFFICIENT SERVICE WAS HAD IN THIS CASE.

The following rules as to substituted service in the Federal Courts are well settled.

> "In federal courts substituted process is commonly resorted to in suits of a dependent or ancillary character, as in cross suits to en-

join the execution of judgments at law obtained in the same court. In such suits the process may be served upon the attorney or counsel of record, in the principal suit, of the party who is to be brought in; or it can be served upon the party himself outside the district where the litigation is pending. And it may be served by the marshal of any district where the party may be found. The practice is permissible in any proceeding of an ancillary nature." *1 Street's Federal Equity Practice*, p. 382.

"In granting an order allowing substituted process on an attorney or agent, the court may also direct that a subpœna be served on the party wherever he may be found. This is merely an extra precaution, calculated to guard against surprise. Such a subpœna served on a party is not an original process constituting the basis of the court's jurisdiction. It is only a species of notice, and it may be served out of the district." *1 Street's Federal Equity Practice*, p. 386.

"Under the existing practice an order for substituted service may be granted in any equitable proceeding that is a dependency on another suit or action in which the court has acquired, and has, jurisdiction over the party on whom the process is to be served. It is available in any ancillary proceeding, where such substitution is necessary to enable the court to proceed in the matter." *1 Street's Federal Equity Practice*, p. 388.

"For the purpose of receiving notice of an ancillary suit, a party to the principal suit is represented by his counsel or attorney of record in the principal suit; and it is the duty of such attorney, upon receiving the no-

tice to bring it to the attention of his client. This legal duty on the part of the attorney is not affected by the circumstance that the relation of attorney and client may have been actually terminated as between the parties. It springs from the relation occupied by them in the original suit, and their relation on the record. Nor is it material that the original retainer of the attorney extended only to the particular suit and was not a general retainer. The original retainer in a suit extends to all proceedings that immediately affect the right of the client to recover the property in controversy in that suit or to enforce the judgment when recovered." *Street's Federal Equity Practice*, p. 386.

Substituted service of a subpœna, in ancillary proceedings, upon the attorney, or other agent, of a non-resident defendant to such proceedings, has been often held sufficient to confer jurisdiction to hear and determine the matter. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall (U. S.), 633, 634; *Dunn* v. *Clarke*, 8 Pet. 1, 3; *Gregory* v. *Pike*, (C. C. A.), 79 Fed. 520, 521; *Gasquet* v. *Fidelity Trust, Etc., Co.* (C. C. A.), 57 Fed. 80, 84; *Abraham* v. *North German Fire Ins. Co.*, 37 Fed. 731; *Crellin* v. *Ely*, 13 Fed. 420, per Mr. Justice Field; *The Cortes Co.* v. *Thannhauser*, 9 Fed. 226 per Blatchford, C. J.

In *Gregory* v. *Pike*, *supra*, the Court said:

"The law is well settled that in nearly all, if not in all, of the classes of proceedings of an ancillary character, service may be made under some circumstances on the attorney of record, or on some other agent of the defendant in such proceedings with the same effect

as though made in strict compliance with the [equity] rule."

In *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. (U. S.), 633, 634, this Court said:

> "This Court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit *without actual service of subpœna* on the defendant, and though he be *a citizen of another State*, if he were a party to the judgment at law."

In *Maitland* v. *Gibson*, 79 Fed., 136 a bill was filed to subject a patent to the payment of costs awarded in a previous suit in the Federal Court in which the owner of the patent had been the plaintiff. It was held that the *original bill* in the subsequent suit might be treated as a dependent or ancillary proceeding, and that *no subpœna was necessary*, and that a *mere notice* of the filing of the bill, and of a motion for injunction was sufficient. The defendant in the subsequent bill was *not an inhabitant of the District*. The Court said:

> "Treating it as a petition in the suit to which it relates, the plaintiff in that suit is, of course, entitled to answer it and to be heard upon it; but these rights he must exercise if he desires to do so *upon notice merely*, without subpœna, and notwithstanding the fact that he is not an inhabitant of this district. By bringing this suit in this court, he voluntarily submitted himself to its jurisdiction, and he cannot escape from the consequences of its adverse decree by asserting

that he is no longer amenable to its process."

This is precisely applicable to defendant Ogilvie. The practice indicated was followed in the case at bar.

In *Cortes* v. *Thannhauser*, 9 Fed., 226, a bill was filed to enjoin actions at law pending in the Federal Court. The defendants to the bill, who were the plaintiffs in the law actions, were not residents of the district. The Court granted a motion for an order permitting a substituted service of subpœna upon the non-residents' attorneys in the law actions, the procedure being the same as followed in the case at bar. Judge Blatchford, said:

> "It is a well settled principle that a bill filed on the equity side of a court, to restrain or regulate a judgment or a suit at law in the same court, is not an original suit, but ancillary and dependent, and supplementary merely to the original suit; and that such a bill can be maintained in a federal court without reference to the citizenship or the residence of the parties." (Citing cases.) "On this principle the equity suit, not being an original suit, the process or notice issued on its being brought, to advise the plaintiff in the suit at law that it has been brought, is not regarded as an original process or as an original proceeding. Such plaintiff is in court voluntarily for the purpose of prosecuting this suit at law and obtaining a judgment, and thereby makes himself subject to any control the court may find it equitable to exercise over his suit at law and over the matters involved in it. * * * All that is requisite is that the plaintiff in the suit at

> law should have notice from the court of the institution of the proceeding in equity. * * * He is represented, for the purpose of giving notice to him of the institution of such proceedings, by his chosen attorney in the suit at law. This is a necessity. His residence may be unknown, or if known, remote. His attorney is presumed to know how and where to communicate with him. Therefore, it is proper to give such notice to the attorney, and it is the duty of the attorney to bring such notice to the attention of his client. * * * A subpœna or notice issued on the filing of such a bill as those in the present suits, has never been regarded, in the Courts of the United States, as an original process or proceeding, and has been allowed to be served on the attorney for the plaintiff in the suit at law, and even to be served on such plaintiff out of the district."

No question arises here as to the sufficiency of the supplimental bill, or as to the extent of affirmative relief which may be granted under it against Ogilvie. That is a matter for the District Court to determine in the exercise of its jurisdiction. The sole question here is whether the proceeding is ancillary in character, so as to justify substituted service. *Gasquet* v. *Fidelity Trust etc. Co.*, (C. C. A.) 57 Fed. 80, 84. Of course, the present supplemental bill in the nature of a bill of review is such an ancillary proceeding, as already shown.

Even in the case of an independent and purely original suit, if necessary to prevent a failure of justice, substituted service upon an agent or attorney is sufficient to support a decree *in personam* against his non-resident principal. Such

was the practice of the High Court of Chancery in England, which was adopted for the federal courts by former Equity Rule No. 90. This has been directly decided by the Circuit Court of Appeals for the Seventh Circuit.

> *Kelley* v. *T. L. Smith Co.*, 196 Fed. 466 (where a Wisconsin corporation, pressed with suits in the state court by rival claimants of the same stock, maintained a bill of interpleader, and obtained an injunction against citizens and residents of New York, substituted service being made upon the latter's attorneys in the suit in the state court).

Equity Rule No. 90, was in force when the service herein on Ogilvie was made.

In the present case, upon the filing of the supplemental bill, and upon a showing by affidavit and motion, the District Court entered an order authorizing substituted service upon Ogilvie by serving his attorney and counsel both within and without the District. (Rec., pp. 12, 13.) Service was duly made in strict accordance with said order as appears from the Marshal's return, both his resident solicitor in Cleveland, and his counsel in Boston being so served. (Rec. pp. 13-16.) The subpœna and order for substituted service were immediately sent to said Ogilvie by his said counsel as shown by the testimony of such counsel upon the motion to quash (Rec. pp. 37, 38, 42, 43), and the same were duly received by said Ogilvie as shown by his written acknowledgment of it. (Rec. pp. 50, 51, 52.) His counsel requested a copy of the supplemental bill from appellants counsel (Rec. p. 42), and sent it to Ogilvie. (Rec. p. 52.) Subsequently Ogilvie

opposed a motion for an injunction *pendente lite* under the supplemental bill by filing an affidavit in which he argues the merits. (Rec. p. 62, *et seq.*). It thus appears that the purpose of the substituted service was attained, viz.: notice to Ogilvie. This is sufficient to confer the requisite jurisdiction of the ancillary and supplemental bill. Ogilvie was already in court defending the original bill, and ordinary notice of further proceedings in the cause is all that can be required.

The learned District Court apparently gave some effect to the testimony that Ogilvie's local solicitors, Messrs. Weed, Miller and Nason, had terminated their connection with the case about September 12, 1912, and that the active connection with the case of his counsel, Mr. Bean, ended with the submission of the case in the Court of Appeals in July, 1912, whereas the supplemental bill was filed and service of the subpœna was made upon them in December, 1912. (Rec. p. 83.) The record shows that Weed, Miller and Nason continued to be solicitors of record until January 25th, 1913, upon which date they filed a formal withdrawal of appearance in the Clerk's office. (Rec. pp. 38, 48.) The subpœna had then long since been served upon this firm, having been so served on December 16, 1912. (Rec. p. 14.) They sent the papers so served to Mr. Bean, Ogilvie's counsel, who in turn sent them to Ogilvie who received them on December 20, 1912. (Rec. pp. 42, 43.) Mr. Bean, the counsel of record in the suit has never served or filed notice withdrawing his appearance. He

took part in the settlement of the interlocutory decree upon the mandate (Rec. 40, pp. 93, 94), and afterwards kept Ogilvie advised of the progress of the suit, as the Court below found (Rec. pp. 44, 73). Of course, jurisdiction over Ogilvie attached when he first came into Court and assumed charge of the defense through counsel employed and paid by him, "and no change in the residence or condition of the parties can take away a jurisdiction which has once attached." *Dunn* v. *Clarke*, 8 Pet. (U. S.) 1, 3.

> "No attorney or solicitor can withdraw his name after he has once entered it upon the record, without the leave of the court; and while his name continues there the opposite party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is valid." *Tripp* v. *Santa Rosa St. R. Co.*, 144 U. S., 126. To same effect: *Rio Grand Irrigation, etc., Co.* v. *Gildersleeve*, 174 U. S. 603.

No such leave was granted in this case.

A party who has come into a jurisdiction may not by merely discharging his attorneys step out of it and thereby deprive the Court of jurisdiction to proceed to the end of the case. Having been once in court he remains there until dismissed by an order of the Court. But in any event Ogilvie received due, timely, and actual notice of the supplemental bill against him, and that is all the law requires. No question of constructive notice is involved.

It is true that upon the entry of the interlocutory decree, the original defendant Saalfield did employ personal counsel, who from that time

actually represented Saalfield, as distinguished from Ogilvie (Rec. pp. 45, 46), and thereafter, in all proceedings affecting Saalfield individually, such as the taxation of costs, etc., notices were served upon Saalfield's said attorney. This but emphasizes the fact that the previous attorneys were in truth the attorneys for Ogilvie. Until the supplemental bill was taken *pro confesso* against Ogilvie, his original solicitors were served with all notices affecting Ogilvie, to which he was entitled. After that time, the proceedings were *ex parte* as to Ogilvie, in accordance with the Equity Rules, but notices continued to be served upon Saalfield's attorney, as his attorney, because he had appeared to the supplemental bill and had not defaulted.

## V

OGILVIE'S AFFIDAVIT IN OPPOSITION TO THE MOTION FOR AN INJUNCTION UPON THE SUPPLEMENTAL BILL, ARGUES THE CASE UPON THE MERITS, AND SUBJECTS HIM TO THE JURISDICTION OF THE COURT.

This affidavit is a curious document. When Ogilvie filed it, he was named as a party defendant. While protesting that he does not appear as a party, but only as an expert witness, he does not confine himself to testimony as to facts, but argues the whole merits of the supplemental bill. (Rec. p. 62, *et seq.*). While it is clear that a witness does not appear in a cause by merely giving

testimony, Ogilvie has greatly exceeded the privilege of a witness. He has colorably and evasibly sought to use the guise of a witness as a means of defending his interests as a party, in his own proper person. This affidavit should be held equivalent to a general appearance *in propria persona*. *Ames* v. *Freeman*, 88 Kan. 585; *Livingston* v. *Gibbons*, 4 Johns. Chanc. (N. Y.) 94; *Cooley* v. *Lawrence*, 12 How. Pr. (N. Y.) 176; *Duncan* v. *Wickliffe*, 4 Metc. (Ky.) 118.

> "It is no doubt true that, where a party has been sued as a defendant, and not served with proper process, but nevertheless participates in the trial of the cause, and offers evidence in his own behalf, he thereby submits himself to the jurisdiction of the court, and by his conduct waives a service of process; but, while this is true, it is equally true that one who is not a party to a cause of action, and merely appears for the purpose of testifying either in person or by deposition, does not, by such act, constitute himself a party to the action." *Commercial State Bank of Genoa* v. *Rowley*, (Nebr.) 89 N. W. 765, 766.

## VI

### Conclusion.

It is respectfully submitted that the District Court acquired jurisdiction of Ogilvie, and that the orders denying appellant's petition to enforce

the decree, and quashing service of the subpœna and setting aside all proceedings for want of jurisdiction, were erroneous and should be reversed.

December 22, 1915.

WILLIAM B. HALE,
Counsel for Appellant.

JAS. A. FORD,
Of Counsel.

IN THE

# Supreme Court of the United States

October Term, 1915.

No. 178.

G. & C. MERRIAM COMPANY, *Appellant*,

*vs.*

ARTHUR J. SAALFIELD, SAALFIELD PUBLISHING COMPANY AND GEORGE W. OGILVIE, *Appellees*.

BRIEF AND ARGUMENT FOR APPELLEES.

WARD H. ELLIS,
CHARLES E. KELLY,
*Counsel for Appellees*.

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## BRIEF AND ARGUMENT FOR APPELLEES.

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### STATEMENT.

The case for the appellant, on the merits, rests upon the astonishing proposition that one who contributes to the expenses of litigation becomes an actual party of record to the suit, and, though not made a party in the pleading, not served with summons and not appearing, and not even being a resident of, or within, the jurisdiction, may be proceeded against in the collection of the judgment in

the case, by serving counsel to whose fees he contributed, and judgment may be recovered against him by default.

The mere statement of this contention would seem to dispose of it. But we will examine the facts to which this proposition is applied and the cases which are supposed by counsel for the appellant to lend color to this view of the law.

As the statement of facts in the brief for appellant is controverted, we deem it necessary to present our view of the record in this case.

The history of the litigation of which the present appeal is but a part, is shown in certain recent "Webster dictionary cases" (*Ogilvie vs. G. & C. Merriam Co.*, 149 Fed., 858; 159 Fed., 638; 170 Fed., 167, and *G. & C. Merriam Co. vs. Saalfield*, 190 Fed., 927; 198 Fed., 369), and in the opinion of the District Court in the present case (Rec., p. 72).

In 1904 George W. Ogilvie, a publisher of certain "Webster's Dictionaries," brought suit in the District Court of Massachusetts against the G. & C. Merriam Co., to enjoin that company from interfering with his trade as a publisher of such dictionaries and from claiming the exclusive right to the use of the name "Webster" upon dictionaries. The Merriam Company filed a cross bill alleging unfair competition by Ogilvie, seeking to enjoin the use of the name "Webster" by him and the use by him of certain advertisements, and claiming an accounting of profits. The case went twice to the Circuit Court of Appeals for

the First Circuit. It was agreed in all the decisions that,

> "Upon the expiration of the copyright the name 'Webster' passed into the field of public right.
>
> "The statutory monopoly having expired under the statutory limitation, the word 'Webster' used in connection with a dictionary became public property, and any relief granted upon the idea of title or proprietorship in the trade name of 'Webster' would necessarily involve an unwarrantable continuance of a statutory monopoly secured by the copyright." (159 Fed., 638, 640.)

And the Merriam Company was expressly enjoined from interfering with the business of Ogilvie in the manner in which that company had been doing and from claiming the exclusive right to the use of the word "Webster." Certain limited relief was also granted against Ogilvie in regard to the use of the name "Webster" by him, the Court of Appeals requiring that he should accompany the use of the name with a statement which would indicate clearly that his books were not published by the Merriams. An accounting against Ogilvie was expressly refused, the Circuit Court of Appeals holding that both parties were at fault and finding, among other things, that, as to the Merriam Company, it had unlawfully issued circulars claiming the exclusive right to the word "Webster" and threatening to commence suit against "all who might without its consent make or sell dictionaries bearing the name Webster's" (170 Fed., 167, 170).

While the Massachusetts case was being fought out between Ogilvie and the Merriam Company, the publication of certain "Webster's Dictionaries" was commenced by Arthur J. Saalfield of Akron, Ohio (doing business as the Saalfield Publishing Co.), under a contract between Ogilvie and Saalfield. Suit was then started by the Merriam Company against Saalfield in the Circuit Court for the Northern District of Ohio. Here again the bill filed sought, in effect, to enjoin the defendant from all use of the word "Webster's" upon dictionaries, but it also alleged that the defendant was violating the terms of the injunction decree in the Massachusetts decision (*Ogilvie vs. Merriam, supra*). Both an injunction and accounting were prayed for.

The Circuit Court dismissed the bill, "the court being of the opinion that the controversy was concluded by the decree of the court in the Massachusetts case" (190 Fed., 927, 929). This action of the Circuit Court was reversed by the Circuit Court of Appeals for the Sixth Circuit in *Merriam Co. v. Saalfield*, 190 Fed., 927, the Court of Appeals being of the opinion that while the decree in the Massachusetts case concluded the general equities of the parties, and determined that the Merriam Company had not the exclusive right to use the name "Webster's" and that the public generally had the right to use the name when accompanied, however, by an explanation, yet

> "the question whether the alleged conduct of the defendant is in violation of rights of the com-

> plainant is an open one, and must be determined upon its own facts and not upon the assumption that they are to be judged of merely by comparison with the requirements of the decree in the Massachusetts case" (190 Fed., 932).

Further argument was had on rehearing (198 Fed., 369) and the Circuit Court of Appeals reversed the decree below, ordered that the publication of the Webster's dictionaries involved in the case be enjoined in the form in which they were issued and unless accompanied by an explanatory notice similar to that in the Massachusetts case, and directed an accounting of the profits from all books involved in the litigation.

The mandate from the Circuit Court of Appeals was filed in the District Court September 7, 1912 (Opinion below, Rec., p. 72). A final decree on the mandate was entered by the District Court on September 12, 1912, and on September 20th notice of motion to tax costs in the entire case was served upon counsel for the defendant.

Thereafter a *settlement* was made between the parties of all damages growing out of the accounting of profits on books involved in the litigation (Rec., p. 45, and opinion below, Rec., p. 74).

*After all this*, counsel for the Merriam Company, having learned that George W. Ogilvie, of New York, had helped Saalfield financially in the defense of the action, sought to get a money judgment against Ogilvie for the same acts in the same case, notwithstanding Ogilvie was not made a defendant, had not ap-

peared and was not a resident of nor within the District or State.

How such an extraordinary thing could be accomplished, it is difficult to imagine. But counsel for the Merriam Company, on December 16, 1912, filed a supplemental bill (Rec., p. 1) setting forth, among other things (Rec., p. 5), that he had just learned that Ogilvie had directed the defense of the case and paid counsel and was interested in the proceedings and therefore had made himself a privy to the suit and an actual party thereto, wherefore he prayed that Ogilvie may account for profits, etc., and that complainant may have the same relief against Ogilvie as it might have had if the facts charged in the supplemental bill had been charged in the original bill. And then counsel, proceeding on the theory, not that Ogilvie might be estopped in a subsequent suit properly brought against him and in which he was properly made a party, but, that Ogilvie was already an actual party to the Saalfield suit, filed an affidavit "that it is impossible to make personal service of subpoena upon * * * Ogilvie in this district because * * * Ogilvie is not a resident of and not to be found within this district," and substituted service of subpoena was made upon counsel (in fact, former counsel only) of the defendant Saalfield in the *Merriam-Saalfield case* (Rec., pp. 12, 13, and Opinion below, Rec., p. 73).

Ogilvie did not respond and entered no appearance, plea, answer, demurrer or motion (Rec., p. 17). Thereafter judgment by default for $81,312.78 was taken against Ogilvie as an accounting upon the die-

tionaries involved in the case (Rec., p. 19), for the violation "of complainant's rights as charged in the original and supplemental bills."

Thereupon counsel for Ogilvie, Messrs. Calfee & Fogg, of Cleveland, appearing specially for the purpose of raising the question of jurisdiction, and that alone, filed a motion to quash the subpoena issued by the Clerk on December 16th, and to set aside all judgments and proceedings based thereon (Rec., p. 31).

The Court (Day, District Judge) granted the motion, quashed the substituted service and set aside the judgment and proceedings based thereon (Rec., p. 71) and denied the petition of the complainant for enforcement of decree, etc., filing an opinion (Rec., p. 72) which is contained in the appendix to this brief.

At the hearing upon the motion to quash service, etc., it appeared, as shown by the record in this case, that by the terms of a contract between Ogilvie and Saalfield under which Saalfield and the Saalfield Publishing Company were publishing certain Webster's dictionaries Saalfield and the company had agreed to comply with the conditions contained in the Massachusetts decree (*Ogilvie vs. Merriam, supra*), and to bear the expenses incurred by a breach of these conditions and Ogilvie was to pay any expense in connection with other suits started with reference to the dictionaries (Rec., pp. 29, 73); that by an understanding between Saalfield and Ogilvie, Geo. F. Bean who had been in the Massachusetts case was employed to conduct the defense for Saalfield (Rec., p. 39 and so found by the court below, Rec., p.

73); that Geo. F. Bean had engaged Charles R. Miller, of Cleveland, to assist in the defense (Rec., p. 39 and Opinion below, Rec., p. 73); and had paid the expenses and charges of Miller (Rec., p. 34 and so found by the court below, Rec., p. 73); that Bean had charge of the litigation and during its progress he communicated with Saalfield and also frequently communicated with Ogilvie (Rec., p. 40 and so found by the court below, Rec., p. 73). The expenses and disbursements of Mr. Bean in the case were paid sometimes by Ogilvie and sometimes by Saalfield (Rec., pp. 41, 44 and so found by the court below, Rec., p. 73); that Ogilvie did not pay any part of the fees or disbursements after the dismissal of the case by the court below and the reversal in the Court of Appeals (Rec., p. 44), and for services after that bill was rendered to Saalfield and paid by him (Rec., p. 44) and Mr. Bean's active connection with the case ended with the submission to the Court of Appeals July 19, 1912 (although after that time he advised Ogilvie concerning the progress of the suit), and Charles R. Miller's connection with the case ended with the dismissal by the Circuit Court (Opinion below, Rec., p. 73); and Mr. Miller in open court informed the court on September 12, 1912, that his services were terminated (Rec., p. 34 and so found by the court below, Rec., p. 74).

It further appeared that after the decision of the Circuit Court of Appeals, Saalfield retained Judge Sieber, of Akron, to represent him in the case (Rec., p. 45) and no other counsel appeared or had anything to do with the litigation for Saalfield after that date

(Rec., p. 45); and on September 12, 1912, Sieber appeared in court for the Saalfield interests (Rec., p. 74); that Saalfield and Judge Sieber had gone to Boston prior to this to confer with Bean in August, 1912, as to the form of final decree and for this service early in September Bean rendered a bill to Saalfield and was paid in full (Rec., p. 40, Opinion below, p. 73), and thereafter on September 20, 1912, counsel for complainant served upon Judge Sieber as sole attorney for defendant the notice of motion to tax costs (Rec., pp. 46, 74); that after Sieber came into the case he was served by counsel for the complainant with all papers as sole counsel (Rec., p. 46); that Judge Sieber conducted negotiations for the settlement of "all questions of damages in the case with the G. & C. Merriam Company" and by the settlement the judgment on the accounting for the books involved in the case "was released and cancelled" (Rec., pp. 45, 46) and the court below expressly stated in the opinion (Rec., p. 74) that prior to December 16, 1912, when the supplemental bill was filed, "the Saalfield interests had settled with the complainant."

To summarize it was thus shown at the hearing:

(1) That Ogilvie had not been named a party defendant in the Merriam-Saalfield suit, that he had not appeared therein and was not a resident of the district, and no counsel entered any appearance in any way for him or for themselves as representing him.

(2) That up to the time of the dismissal of the bill by the lower court and the reversal by the Court of

Appeals, Ogilvie had paid part of the counsel fees and Saalfield had paid part and thereafter and for services thenceforth, Saalfield paid all the counsel fees.

(3) That at the time of the so-called substituted service, the counsel who were served and whose fees had been paid in part by Ogilvie, had ceased to be counsel in the case even for the defendant Saalfield, but new counsel had been engaged by Saalfield and recognized by the complainant, and this new counsel was not served.

(4) That prior to the filing of the supplemental bill the complainant had made a *settlement* for the damages growing out of the accounting on the dictionaries involved in the litigation.

Upon these facts alone—aside from the unsoundness of the theory upon which the supplemental bill proceeded—the service of subpoena by which it was sought to bring in George W. Ogilvie and get a judgment against him ought to be set aside.

It is upon such a record that appellant now contends the court below was wrong in quashing the substituted service and in not holding that Ogilvie was an actual party to the Merriam-Saalfield case and that judgment could be recovered against him in that case for damages for the publication of the dictionaries sold by Saalfield and involved in the litigation.

After the court below quashed the service and set aside the judgment, etc., counsel for the Merriam Company came to this Court with a motion for leave to file a writ of mandamus to compel the District

Court to assume jurisdiction and this motion was denied (234 U. S., 748).

Thereafter counsel filed the present appeal in this Court, claiming the right to appeal direct from the District Court to the Supreme Court under Section 238 of the Judicial Code.

## I.

## MOTION TO DISMISS.

THIS CASE WAS NOT APPEALABLE TO THIS COURT DIRECT FROM THE DISTRICT COURT AND THIS APPEAL SHOULD BE DISMISSED.

This appeal is brought to this Court direct from the District Court for the Northern District of Ohio, Eastern Division, under the supposed authority of Section 238 of the Judicial Code. We contend that Section 238, providing for appeal direct to this Court from the District Court, in cases in which the jurisdiction of the District Court is in issue, does not include a case of the kind here presented.

This question, we submit, has been settled by the decisions of this Court.

Section 238 of the Judicial Code provides as follows:

> "Appeals and writs of error may be taken from the District Courts, * * * in any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is now well settled that the "jurisdiction of the court" referred to in Section 238 means the jurisdiction of the court *as a federal court,* and not its general jurisdiction as a judicial tribunal.

This interpretation has been made numerous times by this Court. In a very recent pronouncement upon the subject, *Bogart vs. Southern Pacific Co.,* 228 U. S., 137, Mr. Justice Day, speaking for the Court, and referring to the question of jurisdiction mentioned in Section 238, says:

> "The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a federal court. Questions of general jurisdiction, applicable as well to state as federal tribunals, are not included in such review.
>
> "The question can not be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself."

Further it is said:

> "The question to be decided is whether the case was dismissed for the want of jurisdiction in the Circuit Court as a Federal Court; for if it be found that the case was dismissed because of the decision of a question not peculiar to the Federal jurisdiction, and involving only a general question of procedure in equity, this court need not consider it."

The question presented to the District Court in the case at bar was whether the complainant in an equity

suit could by supplemental proceedings bring in as additional party to the case a person who had not theretofore been a party, upon a showing that such person was interested in the outcome of the suit and had contributed to the expenses of the litigation.

If the contention of the complainant below presented any question of merit it obviously presented only a general question of procedure in equity and not one peculiar to the District Court as a Federal Court. Precisely the same question of jurisdiction of a court of equity would have arisen in a State Court if the suit had been pending there and the contention had been made that a person not a party to the case had nevertheless made himself an actual party by contributing to the expense of the litigation and judgment was sought against him on that ground.

Counsel for appellant insists in his brief, page 26, that the supplemental bill filed in this case is a dependant and ancillary proceeding, bringing in an additional party. If so, then the only question presented was a question of the rules of practice as to bringing in parties to ancillary proceedings in equity.

This Court has expressly held in *Bache vs. Hunt*, 193 U. S., 523, that such question is one with respect to the general authority of the court as a judicial tribunal and not in respect of its power as a Federal Court. Mr. Chief Justice Fuller, speaking for this Court in that case, said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect

of its general authority as a judicial tribunal, and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction, which the Act of March 3, 1891 (now Section 238 Judicial Code) provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court.

"Tested by this rule our jurisdiction fails and the appeal must be dismissed."

That case was cited with approval in *Courtney vs. Pradt*, 196 U. S., 89, where it appeared that one Merrit B. Atwater and one William C. Atwater had been partners, that Merrit B. had died and Louis A. Pradt had been appointed his executor; and both Atwater and Pradt were non-residents of Kentucky; that Courtney, a citizen of Kentucky, brought suit in that State against William C. Atwater, one of the partners, and Pradt as executor of the other partner; that Atwater was brought in by attachment of his interest in a corporation, but there was no service on Pradt; that the case was removed to the Federal Court, and Pradt and Atwater, appearing for that purpose only, moved the court to dismiss the case for want of jurisdiction, which motion the Circuit Court sustained. Appeal was taken direct to the Supreme Court and this Court dismissed the appeal saying:

"The appeal was taken directly to this Court and can not be maintained unless the case comes

> within the first of the classes named in Section 5 of the Judiciary Act of March 3, 1891, which gives an appeal or writ of error direct 'in any case in which the jurisdiction of the Court is in issue; in such cases jurisdiction alone shall be certified to the Supreme Court from the court below for decision.'
>
> "It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit Court as a court of the United States and not in respect of its general authority as a judicial tribunal."

The rule that the question of jurisdiction which permits direct appeal must be one relating to the jurisdiction of the court *as a Federal tribunal* and not merely one relating to its general jurisdiction as a court, is no longer open to question.

Without discussing the later opinions of this Court which distinguish the cases above cited from those in which the question of jurisdiction arises at the threshhold of the whole case and the court gets jurisdiction over no one, it is sufficient to say that the rule now agreed upon without question is directly applicable to the case at bar; that its application to a case of this kind has not been denied, and that the cases above cited are decisive of the question.

We therefore submit that this appeal was improperly brought here, and should be dismissed.

## II.

## ARGUMENT ON THE MERITS.

### (1) The Theory that the Estoppel of Ogilvie, if Any, Could be Used to Take the Place of His Being Made a Party of Record and be the Basis of a Judgment Against Him in the Case, is Fallacious and Unsupported by Any Authority.

If this Court should be of the opinion that it has jurisdiction to entertain this appeal direct from the District Court, then we desire to show that the action of the District Court in quashing the service on Ogilvie, and setting aside the proceeding based thereon, was correct.

Before taking up the argument on the proposition upon which counsel for appellant rests his case, it is necessary to advert again to the statement of facts in the brief for appellant, especially the statement set forth in the introduction to the argument (pp. 7, 11, of brief for appellant). While any view which may be taken of the facts in the case does not justify the relief sought in the supplemental bill, yet it seems not improper to point out just what the facts are, as found by the Court below, and as indicated in the narrative form of the testimony. At pages 10 and 11 of brief for appellant counsel recites certain facts relied upon, as follows:

> (1) "This contract (contract between Saalfield and Ogilvie) further provided that Ogilvie would bear the expense in connection with any

suits brought by petitioner against Saalfield in connection with these dictionaries, Saalfield and Ogilvie construed this as requiring Ogilvie to defend the present suit.

(At page 4 of brief it is said: "This contract provided that Ogilvie should defend suits brought by petitioner.")

(2) "Ogilvie not merely paid the expenses of the defense of the suit, but he assumed full charge and control of the defense. * * *

(3) "He took part in the settlement of the interlocutory decree upon the mandate. He retained the solicitors who appeared in Saalfield's name. He paid them their fees and expenses.

(5) "He offered evidence in defense of the bill.

(6) "He thus actually and exclusively litigated this case as appellant's adversary. He had and exercised every right which a party to the record could exercise."

After the above statements, and some others on the subject, counsel for appellant adds:

> "*All the above facts are established without any controversy* and by the testimony of Ogilvie's own solicitors and counsel called by him as witnesses in support of his motion to quash."

We call attention to this last statement, in view of the findings of the Court below and the record in support thereof, so far as the narrative form shows the testimony. We will take up the statements of facts, above enumerated, in their order.

1. The contract between Ogilvie and Saalfield had

nothing to do with assuming or controlling the defense of any suit. It simply provided that in the adjustment of accounts between Ogilvie and Saalfield, expenditures necessitated by suits in certain contingencies should not be charged to the cost of production, and in certain other contingencies should be charged or borne by the other party. The language on the subject in the contract is as follows (Rec., p. 29):

> "That party of the second part (Saalfield Co.) hereby agrees to fully and fairly comply with all the conditions contained in the injunction secured against George W. Ogilvie by G. & C. Merriam Company in the United States Circuit Court, First Judicial District, and any expenditures necessitated or penalties incurred by reason of a breach of this covenant shall not be charged to the cost of production hereinbefore mentioned, but shall be borne in whole by the party of the second part, and any expense in connection with suit started vs. The Saalfield Publishing Company by G. & C. Merriam Company *for other reasons in connection with these dictionaries shall be* borne by the party of the first part (Ogilvie)."

As a matter of fact the course of the Merriam-Saalfield case was such that Ogilvie was not liable, under this contract, for the expenses, or any part of them.

2. The Court below, before whom all the evidence was taken (Rec., p. 33), found that

> "By an understanding between Saalfield and Ogilvie George F. Bean was employed to conduct

> the defense for Saalfield. George F. Bean engaged Charles R. Miller of Cleveland to assist him in this defense. Bean had charge of the litigation and during its progress he communicated with Saalfield and also frequently communicated with Ogilvie. His expenses and disbursements in the case were paid largely by Ogilvie and sometimes by Saalfield." (Rec., p. 73.)

At page 39 of the record Mr. Bean, after testifying that he had been counsel for Ogilvie in the Massachusetts Webster Dictionary case, and that Ogilvie had come to see him as to representing Mr. Saalfield in the Merriam-Saalfield case in Ohio, saying that it was the joint desire of Mr. Saalfield and Mr. Ogilvie that he do that; that he had written to Ohio counsel (Mr. Miller in Cleveland) and had retained him, in conjunction with himself, "to appear for Mr. Saalfield and conduct the business." He further stated (Rec., p. 40):

> "I heard from him (Saalfield) a great many times before that in various combinations, personally and by letter * * * He came to Boston and I met him there, and we discussed on two or three different days, the matter, and what should be done thereafter. Mr. Saalfield went in conference with me and told me he wished me to continue in the defense of the suit so far as was necessary.
>
> "Thereafter I rendered a bill to Mr. Saalfield for the balance of my charges in the matter, which he paid."
>
> (Rec., p. 44) "Mr. Ogilvie paid a part of my fees and Mr. Saalfield a part."

Mr. Bean stated that he had never been attorney for Ogilvie in the Merriam case in Ohio (Rec., p. 60). Mr. Miller was employed by Mr. Bean and paid by him, and had no communication with Ogilvie (Rec., pp. 33-38).

3. The decree, on the mandate, referred to, is that which was entered September 12, 1912, about which Mr. Sieber talked with Mr. Bean as shown on page 40 of the record. As to this decree and counsel who appeared, the Court below found (Rec., pp. 72-74):

> "A *final decree* was entered by this Court on September 12, 1912."
>
> "On September 20, 1912, notice of motion to tax costs in the entire case was served upon George W. Sieber, attorney for Arthur J. Saalfield."
>
> "His (Bean's) active connection with the case ended upon the submission of the case to the Court of Appeals in July, 1912."
>
> "About this time Saalfield engaged George W. Sieber of Akron, as local counsel in the case. In August, 1912, Saalfield and Sieber conferred with Bean in Boston concerning the *formal final decree*, and a bill for these services was rendered to Saalfield by Mr. Bean."
>
> "About September 12, 1912, Charles R. Miller in open court informed the Court that his services in connection with the case were terminated. On the same day George W. Sieber appeared for the Saalfield interests, and on this date a motion to tax costs was served on Mr. Sieber."
>
> "On December 16, 1912, *by which time it appears that the Saalfield interests had settled with*

*the complainant,* the supplemental bill making Ogilvie a party, was filed, together with the petition for service upon Ogilvie."

4. The payment of fees and expenses is shown in the findings of the Court, to which reference has been made.

5. Among other affidavits offered by Mr. Saalfield in opposition to a motion for a preliminary injunction, there was an affidavit of Mr. Ogilvie (as an expert in the preparation of dictionaries) taken in New York. This is the only foundation for the statement that Mr. Ogilvie offered evidence in defense of the bill.

6. The whole of what Mr. Ogilvie did appears, in substance, in the opinion of the Court below, from which quotation has been made. From this it can be determined as to whether Mr. Ogilvie exclusively litigated the case and had every right of a party, and whether this is established without any controversy.

Interpreting the record in the light of the fact of Mr. Ogilvie's knowledge of the issues, due to his controversy with the Merriams in the Boston case, and his natural interest in the outcome of the litigation in Ohio, all that can fairly be made out of the record is that Ogilvie *contributed to the expense of the litigation,* with the additional fact that his advice as to what counsel should be secured was given and taken, and he was constantly informed of the progress of the suit.

Coming now to the main question upon the answer to which appellant must rest his whole contention:

Does one who, even though interested in the subject-matter of a suit, was not made a party to the suit and could not be made a party, become, nevertheless, an actual party of record to the litigation when it is discovered that he has paid, or contributed to the payment of, the counsel fees (and has helped to select counsel and advise with them, if this be material) so that a judgment against the defendant in the case, really becomes a judgment against him, and he may be proceeded against in the same case as by default?

Such a thing is unheard of in any of the decisions of the courts, so far as we are aware. Certainly counsel for the appellant has pointed out no such case.

It is true, there are many cases which discuss and decide the question as to when the acts and conduct (such as paying expenses, etc.), of one not a party to the record in a particular case, will estop such person *in another case* where such person has been properly sued, and which involves the same issues. This is a branch of the doctrine of "*Res Adjudicata*," the principles of which have been frequently stated and are well recognized.

But to say that this doctrine of *res adjudicata* and the cases applying it, mean that the party who was, or would be, estopped in a subsequent suit against him, and in which he was properly sued as a party, really also became an actual party in the previous suit, and judgment might have been recovered against him in such previous suit, is a complete misconception of the doctrine of estoppel by *res adjudicata* and of all the cases on the subject, and is mere confusion.

The question of *res adjudicata* raised in a case is not a question of bringing in parties to the case, but is a question of the estoppel of parties after they are properly brought in and served. It is one thing to say that Ogilvie, when properly sued, in a case raising the same issues as those in the Merriam-Saalfield case, might be estopped because of his conduct in the Merriam-Saalfield case; but it is a totally different thing to say that such estoppel entirely dispenses with the necessity of making him a party defendant in the regular way and bringing him before the Court by well known processes for that purpose.

It is useless to discuss at length all the cases which counsel for appellant cites as supporting his proposition, since none of them touches the subject and all of them relate to estoppel of persons properly made parties to suits. Even the heading (page 7, brief of appellant) under which counsel discusses the cases, is limited to the statement: "Ogilvie was privy to the original suit and was an actual, although not an ostensible party thereto, in such a real sense that the *decree will be res adjudicata against him.*" Yet he continually draws the conclusion from the cases cited, not that Ogilvie would be estopped in a subsequent suit, but that Ogilvie became an actual party to the record in the Saalfield case, and the judgment in that case can be recovered against *him.*

Even a casual examination of the cases of *Lovejoy v. Murray*, 3 Wall., 1; *Robbins v. Chicago*, 4 Wall., 657; *Litchfield v. Crane*, 123 U. S., 527; and the other cases cited by counsel for appellant, will show that they are all cases of estoppel where a party

properly sued and made defendant, is held to be estopped by conduct, participation, etc., in a previous action involving the same issues.

For example: In *Lovejoy vs. Murray,* 3 Wall., 1, the court decided that when a plaintiff in an attachment suit gives a bond of indemnity to an officer to protect him for acts done in executing the writ of attachment, such plaintiff becomes a joint trespasser with the officer, and when thereafter the attaching officer is sued, and when the party who has indemnified the officer takes upon himself the defense of the suit, such party is concluded by the judgment against the officer *when such indemnifying party is afterwards* sued for the same trespass. In other words, the Court held that the party who indemnified the attaching officer became so related by his own act with the defense of the suit *brought against the attaching officer* that, *in subsequent litigation* he was estopped from claiming that he had no connection with such suit, and that he was in fact concluded by the judgment against the officer.

So as to the case of *Robbins vs. Chicago,* 4 Wall., 657, in which it was held that in a suit by the City of Chicago against Robbins to recover damages which the city had been compelled to pay for an injury occasioned by an opening in the sidewalk adjoining Robbins' property, Robbins who had assisted in the defense of a prior case in which the city was adjudged to be liable for the negligent opening was estopped to contest liability to the person injured for the defect in the sidewalk.

So of *Litchfield vs. Crane,* 123 U. S., 527, in which

it was held that a suit between Wolcott (a purchaser of a single half-section of certain river lands) against the Des Moines Navigation Company for damages for breach of covenants of warranty did *not* constitute an estoppel in the subsequent suit between the Navigation Company and a railroad company, where each claimed title to the river lands (although the decision could be used as a judicial precedent), even though the railroad company had filed a brief in the previous case to support the claim of Wolcott.

In the later cases from this Court cited by counsel for appellant (*Rumford Chemical Works vs. Hygienic Chemical Company*, 215 U. S., 156, and *Bigelow vs. Old Dominion Copper Mining & Smelting Company*, 225 U. S., 111), the distinction is even clearer, and these cases indicate also that the facts shown in the case at bar would not even constitute an estoppel in any subsequent suit brought against Ogilvie.

In the *Rumford Chemical Works case* it was contended that the defendant, the Hygienic Chemical Company, a New York corporation, was bound and estopped by a previous suit between the Rumford Chemical Works and the New York Baking Powder Company. In the latter suit it was shown that the Hygienic Chemical Company was manufacturing acid phosphate just as was the New York Baking Powder Co., and would be liable in the same way for any infringment of the patent of the Rumford Chemical Company, and that the Hygienic Company had "undertaken to assist in bearing the burden of the defense" (of the New York Baking Powder Co.

case), and had "contributed to the defense financially and otherwise." It was held that the Hygienic Chemical Company was not estopped or bound by the New York Baking Powder Company case, and was not privy to that case, and the evidence in that case could not be used in the case before the Court.

In the *Bigelow case*, it appeared that separate actions had been brought by the Old Dominion Company against Bigelow in Massachusetts and against Lewisohn in New York for unlawful profits made by them in selling certain properties to the copper company. Bigelow and Lewisohn were jointly interested and joint tort feasors in acquiring the fraudulent profits from the sale of the properties. It was not contended that Bigelow *had become a party* to the Lewisohn case in New York, although he was a joint tort feasor and joint promoter with Lewisohn and had assisted in the defense. In fact this Court in the course of the opinion says: "The New York court had no jurisdiction to render a judgment *in personam* against Bigelow. He was confessedly not a party." Separate action was brought against him in Massachusetts. In the Massachusetts suit, Bigelow contended that the action against him was concluded by the action against Lewisohn in New York, which had resulted in a dismissal. This Court held that the action against Bigelow was *not* concluded by the action against Lewisohn, and that the latter action could not be pleaded in bar to another suit by the same plaintiff upon the same facts against Bigelow. In the course of the opinion this Court stated

that if the judgment in the Lewisohn case had been for the plaintiff, Bigelow would not have been bound in a subsequent suit by the same plaintiff against him; that the right of action against both might have been extinguished by a settlement with one, or by a judgment against one and satisfaction, and that the so-called estoppel was not mutual; that the relationship of tort feasors was not such as to constitute privity, and that the *recovery* against one of two joint tort feasors does not conclude the other tort feasor when he becomes a defendant in another action, and neither should the *failure to recover* against one of two joint tort feasors be a bar to a suit against the other upon the same facts.

So of all the cases cited from the lower Federal Courts. In none of them is there the slightest recognition of the doctrine that one who when sued and served by proper process might be estopped because of his conduct with relation to a previous case involving the same questions, is also by that fact, *made an actual party* in law for all purposes *in the previous suit* and judgment can be recovered against him *in that suit*. As to only one of them does counsel point out by reference to the holding, any suggestion of sanction for such view. This is the case of *Eagle Mfg. Co. v. Miller*, 41 Fed., 351. That case is several times cited in brief for appellant. At page 31 of the brief it is said:

> "In Eagle Mfg. Co. v. Miller, 41 Fed., 351, which was a suit in the Southern District of

> Iowa, a corporation created under the laws of the State of Ohio, which had assumed control and management of the defense, was allowed to be brought in by amendment to the bill, upon the discovery of this fact."

But the case cited does not justify the inference sought to be drawn from it and is not an authority for appellant's contention.

This fact is so clearly pointed out in a later decision, *Bidwell v. Toledo Consol. St. Ry. Co.*, 72 Fed., 10—and one directly on the point involved in the case at bar—that it seems not improper to quote at length from that case.

There the complainants brought suit against the Toledo Consolidated Street Railway Company for damages and an accounting because of the use by the defendant of certain appliances claimed to be an infringement of complainant's patent. The complainants sought by amendment to their bill to bring in as a party defendant to the case the General Electric Company, a non-resident corporation. It was not claimed that the proposed defendant was within the jurisdiction of the Court and amenable to its process or that it could be brought in by original subpoena. But it was sought to hold it as a defendant in the case because it had in fact agreed to protect the Toledo Consolidated Street Railway Company in the use of the appliances and to conduct any defense which the railway company should be put to by reason of the use of such appliances and had, through its counsel, assumed the defense of the case and

furnished witnesses and had therefore, in legal effect, as it was contended, entered its appearance in the suit.

In its opinion the Court said:

> "It will be observed that the Court is now asked to declare that the General Electric Company, by assuming the defense of this suit, as alleged, on behalf of the Toledo Consolidated Street Railway Company, has in fact entered its general appearance, and made itself a defendant in this case, and is to be bound by the decree, if one should be made in favor of the complainants and against the defendant. It is not claimed that there was any intention on the part of the General Electric Company to become a party to this case, or that there is any such desire on its part. It is sought to make the decree in this case binding upon that corporation because of the acts before stated.
>
> "Is it possible for a court to make any orders in this case, under these facts, which would make said corporation a party defendant in this suit against its wish? Counsel insist that the Court has authority to make such an order, and that it should be made to promote justice. It is urgently contended that the plaintiff is now in fact prosecuting this case against both the Toledo Consolidated Street Railway Company and the General Electric Company; that the latter is giving to its vendee and the user of its electrical appliances the benefit of its great corporate wealth and influence, and the benefit of the experience and ability of its counsel; and that if, as the result of such a contest, the complainants should prevail, they should have the benefit of

> their victory by securing a decree which would be binding and conclusive upon the General Electric Company in any subsequent litigation that may occur between the parties."

The Court then proceeded to review the cases which it was urged lent color to the contention. And first the Court took up the case of *Eagle Manufacturing Company vs. Miller*, 41 Fed., 351. The Court said that was a case in which a bill was filed to maintain the validity of letters patent which the defendants had infringed; the defendants were agents of Mast & Company, which made and sold the infringing machine, and that company, as its interests required, had conducted the defense for its agents; and when the decree was entered in favor of the complainants and complainants had filed an amendment seeking to make Mast & Company a party, the Court had stated that Mast & Company, having assumed the control and management of the defense, would, under the doctrine of *Lovejoy vs. Murray*, and *Robbins vs. Chicago*, be bound by the decree, and the Court had perceived no reason why that fact might not be made to appear on the face of the decree; but Mast & Co. had not been made a party or allowed to be made a party and the decree on its face did not profess to run against Mast & Co. or to be binding in its terms upon it.

The Court then referred to the decision in *Lovejoy vs. Murray*, 3 Wallace 1, and *Robbins vs. Chicago*, 4 Wallace, 657, pointing out that they were the cases relied upon in the *Miller case*, and that they could

not have been cited as authority to support the construction sought to be put upon the decision in that case.

The Court continued:

> "These are the cases relied upon by Judge Shiras to support his decree in the case cited by complainants' counsel. They could not have been cited as authority to support the construction which counsel in this case now seek to put upon the decision made by Judge Shiras in the case to which reference has been made. As before stated, Mast & Co. were not made parties to the suit before Judge Shiras, and the decree *did not undertake to bind them as a party defendant*, but simply undertook to show such a state of facts as would tend to estop them *in subsequent litigation* from again controverting the issues made in the suit of which they had notice, and in which they were interested, and in which they participated in the manner stated."

Concluding its opinion, the Court said:

> "I am therefore of the opinion that as the General Electric Company is a non-resident corporation, and can not be brought into this court by original subpoena, leave can not be given to amend the bill to make it a party against its will, by reason of the facts hereinbefore stated.
>
> "In view of the conclusion reached, it is not necessary to consider the proposition contended for by complainants' counsel that the General Electric Company might waive the question of citizenship, and it has so waived it by the acts hereinbefore stated.

> "The question of whether it has so identified itself with this case as it may be hereafter estopped in subsequent litigation from again defending as to the issues or interests now involved is a question, as I have before said, which can only be passed upon at the final hearing, and in the final decree. This is certainly as far as the Court, under any circumstances, would have authority to act. I can find no authority for the proposition that by such action as the General Electric Company has taken with reference to this case, as hereinbefore stated, it has made itself (being a non-resident corporation), against its own intention and wish, a party defendant in this case, and thereby conferred upon the Court authority to make a decree binding and conclusive upon it as a party defendant."

So the contention of appellant that Ogilvie had become an actual party defendant in the Merriam-Saalfield suit and liable for judgment in that suit—upon which the whole foundation of appellant's argument rests—is without precedent in any adjudicated case and we submit that it is based upon an entire misconception of the doctrine of *res adjudicata*.

(2) The Facts Shown Would Not Constitute Even an Estoppel Against Ogilvie if Properly Sued in a Subsequent Case.

As pointed out in the argument heretofore, it is one thing to say that Ogilvie, by his acts in relation to the Merriam-Saalfield case, would be estopped if properly sued in a case involving the same questions, and a very different thing to say that Ogilvie's con-

tribution to expenses, etc., made him an *actual party of record* against whom judgment could be secured in the *Merriam-Saalfield case* itself. But an examination of the authorities upon which counsel for appellant relies, shows that the facts in this case *are not such as even to constitute an estoppel against Ogilvie, should he be properly sued in a subsequent action and in a jurisdiction where service could be made on him.*

It is expressly alleged in the supplemental bill that Ogilvie's participation in the defense was unknown to the complainant and was learned for the first time *after* the decree on the mandate from the Court of Appeals had been entered.

At page 20 of brief for appellant it is said that the District Court quashed the proceedings against Ogilvie upon the sole ground that "such defense of the suit by him was not known to the appellant until the interlocutory decree on the mandate from the Circuit Court of Appeals had been entered in the District Court."

It is apparent from a reading of the opinion, that the Court below found that Ogilvie's contribution to the expenses was not known to the complainant below until after the *final decree* on the mandate from the Circuit Court of Appeals and after the motion to tax costs in the entire case.

And the Court added, "it is apparent that Ogilvie could not take advantage of the final decree, or be estopped by that decree had it been favorable."

It is evident the Court had in view that Ogilvie would not even be estopped in subsequent litigation

against him; in other words, not only that the facts could not make Ogilvie an actual party of record, against whom judgment could be recovered, but they were not such as would even make an estoppel if Ogilvie were now properly sued in the right jurisdiction.

And this view is correct as shown by the cases referred to in appellant's brief.

In *Bank of Commerce vs. Louisville*, 88 Fed., 398 (cited by appellant to the point that Ogilvie had become a party to the record, but relating, as we have shown, to estoppel in a subsequent suit), it is pointed out that the estoppel exists when the person interested in the defense of the previous action "openly takes substantial control" and where one seeks the benefit of an estoppel by judgment "he must show that he conducted the action or defense, openly to the knowledge of the adverse party."

In *Lane vs. Welds*, 99 Fed., 286, decided by Judges Taft, Lurton and Day, it is said:

> "An estoppel must be mutual. If the defendants did not openly and avowedly, to the knowledge of the complainants, undertake the defense of that suit, the complainants would not have been estopped by the decree, if adverse to them, in a subsequent suit against the defendants.
>
> "In Andrews vs. Pipe Works, 19 C. C. A. 548, a case decided by the Court of Appeals for the Seventh Circuit, in reference to an estoppel originating in the defense of a suit to which the party against whom the estoppel was pleaded was not a party of record, the Court said:

> " 'Estoppels in such cases, as in others, must be mutual, and it is not to be considered that Andrews and Whitcomb became bound by the decree, by reason of their participation in the defense, unless their conduct in that regard was open and avowed, or otherwise known to the opposite parties so that it too, was concluded, or would have been by an adverse judgment.' "

It is manifest that if the decision of the Court of Appeals in the Merriam-Saalfield case and the final decree on the mandate had been adverse to the Merriam Company, that decree would not have bound or estopped the Merriam Company in any subsequent suit against Ogilvie—whose participation in any way in the Merriam-Saalfield case was unknown to that company; nor would Ogilvie have been permitted to set up such estoppel against the Merriam Company. So Ogilvie would not be estopped by the adverse decision against Saalfield.

But in any event Ogilvie would not be estopped in any subsequent litigation. If there was any unfair competition in the publication of dictionaries in which Ogilvie and Saalfield participated they were joint tort-feasors and a favorable or adverse decision could not be used as an estoppel in a suit against the other.

*Bigelow vs. Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111.

In the case cited Bigelow and Lewisohn were jointly interested in the sale of certain properties to a company which they controlled, and out of this sale

they made unlawful profits which were to be divided between them. When Lewisohn was sued by the company for the unlawful profits Bigelow assisted in the defense, though he was not a party and not a resident of the jurisdiction. It was held that in the suit against Bigelow, the previous action could not be used as an estoppel. At page 131 this Court says:

> "It requires no discussion to demonstrate that a judgment in the Lewisohn suit against the defendant would not have fixed liability upon the present defendant (Bigelow). Hence there can be no estoppel under our law or under the general principles of jurisprudence because it is not mutual."

At several places in brief for appellant counsel refers to the acquisition of rights by Ogilvie *pendente lite*, and of a contract made *pendente lite*, as though Ogilvie had during the pendency of the litigation with Saalfield acquired Saalfield's interests in the dictionaries. It is not correct to say that Ogilvie acquired his interest in the publication of the books *pendente lite*. Before the commencement of the suit in 1908, Saalfield had begun the publication of Webster's dictionaries under the contract with Ogilvie. It was upon the publication of these dictionaries under such contract that the Merriam Company based its right of action to sue Saalfield in the Merriam-Saalfield case filed in the District Court for the Northern District of Ohio in 1908. The Circuit Court of Appeals refers in its opinion to the fact that Saalfield *had taken over* the publication of the dic-

tionaries *from Ogilvie* prior to the suit. And, as the supplemental bill alleges, Saalfield afterwards transferred and assigned to the Saalfield Publishing Company, his business of publishing and selling the dictionaries involved in the suit, and the Saalfield Publishing Company thus succeeded to Saalfield's rights and took over the contract with Ogilvie, substituting a contract with the company for the old one, as shown by the agreement.

(3) Nothing is Added to the Right of the Complainant by the So-Called Substituted Service.

If Ogilvie was not a party to the record, as we have shown he was not, nothing is added to the discussion by the *method* adopted by the complainant below to get judgment against him in the Merriam-Saalfield case.

Substituted service on attorneys can be made only on attorneys for one *who was a party to the record*. The right to make substituted service on Ogilvie is built up on a false premise and begs the question. Counsel for appellant must first *assume* that Ogilvie was a party to the record and then *assume* again that Bean and Miller were his attorneys of record and that therefore upon such attorneys substituted service might be made.

The cases cited by counsel for appellant as giving the right to make substituted service are cases in which the party sought to be served by notice to his attorneys, had come into court and was seeking affirmative relief at the hands of the court in some action therein.

As we have pointed out Ogilvie was not a party to the record, the attorneys served were not attorneys for Ogilvie, and even any payment of part of counsel fees to them by Ogilvie and the services in the case for which any contribution of payment had been made, *had ceased* prior to the time that any service was made upon the attorneys—as shown by the testimony and found by the court below (Rec., pp. 73, 74).

To meet this last suggestion counsel for appellant relies solely upon the fact that Miller, who had been counsel for Saalfield but had withdrawn in open court on September 12, 1912 (Rec., p. 74), did, after receiving the substituted service, notify the clerk that he had withdrawn and filed a formal withdrawal in the clerk's office (Rec., p. 35). But before the service of the notice on Miller, not only had he withdrawn and notified the court, but other counsel had been obtained by Saalfield and had been recognized as sole counsel for Saalfield by the other side.

The evidence, as we view it, is undisputed that Bean and Miller had ceased to be in any way connected with the case prior to the time of the attempted service upon Ogilvie by service upon these attorneys.

Nor can jurisdiction of the Court be in any way extended in this case by reason of the fact that the pleading filed against Ogilvie was called a supplemental bill. If Ogilvie were not a party he must be served with original process.

*Smith vs. Woolfolk*, 115 U. S., 148.

This is not a case where property of the defendant, Ogilvie, is in custody of the court and where some order is necessary relating to that property in order to do justice to all parties interested therein. Nor does it come within any of the exceptions to the rule that the process of the court may not reach beyond the district.

(4) The Settlement for Damages Arising Out of the Accounting as to the Books Involved in the Litigation.

The injustice of the proceedings by which a judgment was sought against Ogilvie appears from the fact that before such proceedings a settlement was had as to the damages for the alleged unfair competition in the sale of dictionaries involved in the litigation (Rec., p. 74). The amount of the settlement was $6,000.

At page 45 of the record, counsel for Saalfield states that he conducted negotiations for the settlement of all questions of damages relating to the matter with the G. & C. Merriam Company—"a settlement by which the judgment as against Saalfield was released and cancelled." And the Court below found that prior to the filing of the supplemental bill "the Saalfield interests had settled with the complainant" (Rec., p. 74).

Such a settlement would release Ogilvie also.

*Bigelow vs. Old Dominion Copper Mining & Smelting Co.*, 225 U. S., 111, 127.

The supplemental bill did not involve any different books or any different sales from those involved in

the original bill, although it did give an additional reason why the books should not be called "Webster's dictionaries." The sales of all the books had been accounted for and the profits accounted for and a settlement made.

The absurdity of the whole theory of appellant is shown by the fact that it would permit a proceeding against a man not a party to a suit and not in the jurisdiction (though having some interest with the defendant), by serving attorneys who had ceased to have anything to do with the litigation and had ceased any services to which contribution of payment had been made, and thus were under no obligation (if they ever had been) to pay any attention to the service—and thus secure a judgment *by default* against him for large damages for which he had already been relieved from liability by *settlement* with his alleged joint tort feasor.

## CONCLUSION.

We submit

1. That this case was not appealable to this Court direct from the District Court under the provisions of Section 238 of the Judicial Code and this appeal should be dismissed.

2. That if this appeal be entertained, the court below was right in holding that Ogilvie was not a party to the case and setting aside the proceedings against him.

Respectfully submitted.

WADE H. ELLIS.
CHALLEN B. ELLIS.
*Counsel for Appellees.*

# APPENDIX.

## OPINION OF COURT BELOW.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

In Equity No. 27.

G. & C. MERRIAM COMPANY, *Complainant*,

*vs.*

ARTHUR J. SAALFIELD, THE SAALFIELD PUBLISHING COMPANY, A CORPORATION, AND GEORGE W. OGILVIE, *Defendants*.

DAY, District Judge.

On December 26, 1908, the complainant filed suit in this Court against Arthur J. Saalfield, trading under the name of The Saalfield Publishing Company. Charles R. Miller appeared as attorney of record for Saalfield, and at the trial of the case in this Court George F. Bean, of Boston, appeared.

The case was appealed to the Circuit Court of Appeals, was argued in October, 1911, and re-argued in July, 1912. A mandate from the Circuit Court of Appeals was filed in this Court on September 7, 1912. A final decree was entered by this Court on September 12, 1912. On September 20, 1912, notice of mo-

tion to tax costs in the entire case was served upon George W. Sieber, Attorney for Arthur J. Saalfield.

On December 16, 1912, petition for leave to file supplemental bill was filed and an order for substituted service was made, allowing substituted service to be made upon George W. Ogilvie by service on Weed, Miller & Nason, at Cleveland, and on George F. Bean, in the District of Massachusetts. On December 16, 1912, a supplemental bill, making George W. Ogilvie a defendant, was filed. On February 5, 1913, an order for a decree *pro confesso* was entered. On June 19, 1913, an interlocutory decree against George W. Ogilvie was filed. On October 16, 1913, a final decree and judgment against George W. Ogilvie was entered for $81,363.76.

The complainant did not know of any connection which Ogilvie had with Saalfield or The Saalfield Publishing Company until all of the proceedings in this Court had been concluded, and the two hearings had been concluded in the Court of Appeals and the decree on the mandate entered in this Court.

The complainant does not claim to have had any knowledge of Ogilvie's connection with the case in any way until about the time the supplemental bill was filed on December 16, 1912.

It does not appear that Ogilvie ever openly, to the knowledge of the complainant, undertook the defense of the suit.

Under the terms of the contract between Ogilvie and Saalfield, filed in this cause, Saalfield was to fully and fairly comply with all the conditions contained in a decree rendered in the Massachusetts

court, between Ogilvie and the complainant, and to bear the expense incurred by a breach of these conditions, and Ogilvie was to pay any expense in connection with other suits started by the Merriam Company against The Saalfield Publishing Company. By an understanding between Saalfield and Ogilvie, George F. Bean was employed to conduct the defense for Saalfield. George F. Bean engaged Charles R. Miller, of Cleveland, to assist him in this defense. Bean had charge of the litigation, and during its progress he communicated with Saalfield, and also frequently communicated with Ogilvie. His expenses and disbursements in the case were paid largely by Ogilvie, and sometimes by Saalfield. Mr. Bean paid all the expenses and charges of Charles R. Miller, the Cleveland attorney. Charles R. Miller's active connection with the case ended upon the decree being entered in the Circuit Court by former Judge Tayler of this Court. He took no part in the hearing in the Court of Appeals at Cincinnati, although his name appears upon the brief. According to George F. Bean's testimony, his active connection with the case ended upon the submission of the case to the Court of Appeals in July, 1912, although after this time he advised Ogilvie concerning the progress of this suit.

About this time Saalfield engaged George W. Sieber, of Akron, as local counsel in the case. In August, 1912, Saalfield and Sieber conferred with Bean in Boston, concerning the formal final decree, and a bill for these services was rendered to Saalfield by Mr. Bean.

About September 12, 1912, Charles R. Miller, in open Court, informed the Court that his services in connection with the case were terminated. On the same day George W. Sieber appeared for the Saalfield interests, and on this date a motion to tax costs was served on Mr. Sieber.

On December 16, 1912, by which time it appears that the Saalfield interests had settled with the complainant, the supplemental bill making Ogilvie a party was filed together with the petition for service upon Ogilvie.

It is apparent from the contract that Ogilvie is the owner of the copyrights of all of defendant's dictionaries; also the owner of the plates from which these dictionaries are printed; that he supplies the plates from which the dictionaries are printed, and the dictionaries are manufactured, advertised and sold by The Saalfield Publishing Company, and from the sale of these books Ogilvie receives a substantial revenue. By the terms of the contract, Ogilvie bore the expense in connection with suits started against The Saalfield Publishing Company by G. & C. Merriam Company, and it is claimed that from these facts Ogilvie is a party to this suit and must respond to the findings of the final decree. It was not endeavored to make Ogilvie a party until the time of the final accounting, when the supplemental bill was filed and an effort made to secure substituted service. It is apparent that Ogilvie could not take advantage of the final decree or be estopped by that decree, had it been favorable, and from a careful examination of the decisions cited by counsel in their briefs, I can

not reach the conclusion that Ogilvie was a party to the litigation, either directly or by estoppel at the time the substituted service was endeavored to be made.

Being of the opinion that Ogilvie was not a party to the record at the time of the attempted substituted service, a motion to quash the service of subpœna will be sustained.

DAY, *Judge.*

Cleveland, Ohio.
February 20, 1914.